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CASES

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ON

PUBLIC SERVICE COMPANIES:

PUBLIC CARRIERS, PUBLIC WORKS, AND OTHER PUBLIC UTILITIES.

BY

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PREFACE.

THIS collection of cases is designed to show the development of the law of public service in its most modern forms: the public carriers, the public works, and the other public utilities. The distinction between the private callings — the rule — and the public callings — the exception — is a striking feature of the law governing business relations as it is to-day. The causes of the division are economic rather than strictly legal. Free competition, the very basis of the modern social organization, superseded almost completely medieval restrictions, but it has just come to be recognized that the process of free competition fails in some cases to secure the public good, and it has been reluctantly admitted that some control is necessary over such lines of industry as are affected with a public interest. At this point the problem of public callings becomes a legal one. Principles of law well known in ancient times have been extended (with hesitation at first) to a rapidly increasing number of callings.

No one can carefully study the authorities on this subject without feeling that we are just entering upon a great and important development of the common law. What branches of industry will eventually be of such public importance as to be included in the category of public callings, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal con-

trol through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public service companies in all contingencies may the business of these companies be left in private hands.

As a result of the present state of the law it has seemed essential to bring together (as has not heretofore been done) examples of every sort of public calling. Here will be found decisions concerning coaches and ships, the turnpike and the toll-bridge, the railway and the tram, the inn and the warehouse, the telegraph and the telephone, the purveyors of light and water. Materials are thus provided for analogy and comparison, and for a careful study of the rights and duties of persons engaged in every sort of public employment.

The cases in this collection are so arranged as to present three principal issues: the nature, the obligations, and the rights of public calling. In the first chapter the cases bear upon the general principle (so general as to require for its understanding a detailed examination of many examples) that "when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use." In the second chapter the obligations of public calling are examined, and are found to be fourfold: to serve all, with adequate facilities, for a reasonable compensation, and without discrimination. Without the enforcement of all these obligations the courts could not prevent public service companies from becoming instruments for the oppression of individuals and for the disruption of the industrial order. In the third chapter is examined the extent of the right of a public service company to carry on its business in its own way: to make regulations for the use of its property by the public, and to modify its undertaking by

contracts with individuals. Here the principal subject of inquiry is the limitation upon such general rights caused by the public obligations considered in the preceding chapter.

This collection is intended primarily for use as a basis for class discussion in a law school, and the choice and arrangement of cases have been directed to that end. Cases have been abridged with freedom, but the fact has always been indicated. The annotation is not exhaustive, but is intended to draw the attention of students to a variety of cases, valuable for purposes of study, which bear upon the subjects discussed in the text. In the make-up of this collection almost all of the authorities printed in Beale's Cases on Carriers have been included as the foundation of the present work.

J. H. B., Jr.
B. W.

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CASES ON PUBLIC SERVICE COMPANIES.

CHAPTER I.

NATURE OF PUBLIC CALLING.

ANONYMOUS.

COMMON PLEAS, 1441.

[*Y. B.* 19 *H. VI.* 49, *pl.* 5.]

WRIT of Trespass on the case against one R., a horse doctor, to the effect that the defendant assumed to him at London to cure his horse of a certain trouble, and that he then so negligently and carelessly gave the medicines, etc., that the horse, etc. . . .

PASTON, J. You have not shown that he is common surgeon to cure such horses, and, therefore, although he has killed your horse by his medicines you shall have no action against him without an assumpsit.

ANONYMOUS.

KING'S BENCH, 1450.

[*Keilway*, 50, *pl.* 4.]

NOTE, That it was agreed by the court, that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in covenant. . . . Note, That in this case a man shall have no action against innkeeper, but shall make complaint to the ruler, by 5 Ed. IV. 2; *contra*, 14 Hen. VII. 22.

JACKSON *v.* ROGERS.

KING'S BENCH, 1683.

[2 *Shower*, 327.]

ACTION on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, and setting it forth

as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

NOTE, That it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.

GISBOURN *v.* HURST.

COMMON BENCH, 1710.

[1 *Salk.* 249.]

IN trover upon a special verdict the case was, the goods in the declaration were the plaintiff's, and by him delivered in London to one Richardson, to carry down to Birmingham. This Richardson was not a common carrier, but for some small time last past brought cheese to London, and in his return took such goods as he could carry back in his wagon into the country for a reasonable price. When he returned home, he put his wagon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house; and it was agreed *per Cur.*, that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration, and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier, and the case in Cro. El. 596 is stronger. Two tradesmen brought their wool to a neighbor's beam, which he kept for his private use, and it was held that could not be distrained.[1]

[1] *Vide* Francis *v.* Wyatt, 3 Bur. 1489, 1 Bl. 483, in which it was determined, that a carriage standing at livery is not exempt from distress. In the former report the general doctrine upon the subject is very fully discussed.

GORDON *v.* HUTCHINSON.

SUPREME COURT OF PENNSYLVANIA, 1841.

[1 *W. & S.* 285.]

ERROR to the Common Pleas of Centre County.

This was an action on the case by James B. Hutchinson against James Gordon. The defendant pleaded *non assumpsit.*

The facts were that the defendant, being a farmer, applied at the store of the plaintiff for the hauling of goods from Lewistown to Bellefonte, upon his return from the former place, where he was going with a load of iron. He received an order and loaded the goods. On the way the head came out of a hogshead of molasses, and it was wholly lost. In this action the plaintiff claimed to recover the price of it. There was much proof on the subject of the occasion of the loss: whether it was in consequence of expansion of the molasses from heat, or of negligence on the part of the wagoner, of which there was strong evidence.

The defendant took the ground that he was not subject to the responsibilities of a common carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the court below (Woodward, President) instructed the jury, that the defendant was answerable upon the principles which govern the liabilities of a common carrier.

Blanchard, for plaintiff in error, argued the same point here, and cited in support of it 2 Kent's Com. 597; Story on Bail. 298; 2 Lord Raym. 909; 2 Marsh, 293; Jones on Bail. 306; 5 Rawle, 188; 1 Wend. 272; Leigh N. P. 507; 2 Salk. 249; 2 Bos. & Pul. 417; 4 Taunt. 787.

Hale, for defendant in error, cited 4 N. H. 306; Bul. N. P. 7; 1 Salk. 282; 1 Wils. 281; Story on Bail. 325; 2 Watts, 443.

The opinion of the court was delivered by

GIBSON, C. J. The best definition of a common carrier in its application to the business of this country, is that which Mr. Jeremy (Law of Carriers, 4) has taken from Gisbourn *v.* Hurst, 1 Salk. 249, which was the case of one who was at first not thought to be a common carrier only because he had, for some small time before, brought cheese to London, and taken such goods as he could get to carry back into the country at a reasonable price; but the goods having been distrained for the rent of a barn into which he had put his wagon for safe keeping, it was finally resolved that any man undertaking to carry the goods of all persons indifferently, is, as to exemption from distress, a common carrier. Mr. Justice Story has cited this case (Commentaries on Bailm. 322) to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice.* My conclusion

from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true the court went no further than to say the wagoner was a common carrier as to the privilege of exemption from distress; but his contract was held not to be a private undertaking as the court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier: indeed they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent (2 Commentaries, 597) states the law on the authority of Robinson *v.* Dunmore, 2 Bos. & Pul. 416, to be that a carrier for hire in a particular case, not exercising the business of a common carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story (Com. on Bail. 298) as well as the learned annotator on Sir William Jones's Essay (Law of Bailm. 103 *d*, note 3) does the same on the authority of the same case. There, however, the defendant was held liable on a special contract of warranty, that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges, indeed, said that he was not a common carrier, but one who had put himself in the case of a common carrier by his agreement; yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not, therefore, did not necessarily enter into the inquiry, and we cannot suppose the judges gave it their principal attention.

But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly, than for the wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route, is the criterion of the profession, but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle we could have had no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the

Pennsylvania wagoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance, or in the equipment of their teams from carriers by profession. I can readily understand why a carpenter, encouraged by an employer to undertake the job of a cabinetmaker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer, taking his horses from the plough to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner soliciting the employment of a common carrier, shall be prevented by the nature of any other employment he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case — on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but independent of that, we are of opinion that he is liable as an insurer. *Judgment affirmed.*[1]

ALLEN *v.* SACKRIDER.

Court of Appeals, New York, 1867.

[37 *N. Y.* 341.]

Parker, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants, to be trans-

[1] *Compare:* Fish *v.* Chapman, 2 Ga. 349; Parmalee *v.* Lourtz, 74 Ill. 116; Robertson *v.* Kennedy, 2 Dana, 430; Hanison *v.* Roy, 39 Miss. 396; Sanners *v.* Stewart, 20 Oh. St 69; Chevallier *v.* Straham, 2 Tex. 115. — Ed.

ported from Trenton, in the province of Canada, to Ogdensburgh, in this State, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh. The defendants were the owners of the sloop "Creole," of which Farnham was master. In the fall of 1859 the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at one hundred dollars for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1,346.34; that the injury did not result from the want of ordinary care, skill, or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are, that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and, therefore, the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisbourn *v.* Hurst, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in Dwight *v.* Brewster, 1 Pick. 50, to be, "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In Orange Bank *v.* Brown, 3 Wend. 161, Chief Justice SAVAGE said: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." (Story on Contracts, § 752, *a.*) The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says

Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." (2 Pars. on Cont. [5th ed.] 166, note.)

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says: "The 'Creole' was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly, they were not common carriers; and the judgment should, therefore, be affirmed.

All the judges concurring. *Judgment affirmed.*[1]

INGATE *v.* CHRISTIE.

Queen's Bench, 1850.

[3 *Car. & K.* 61.]

Assumpsit. The declaration stated, that the defendant agreed to carry 100 cases of figs from a wharf to a ship, and that by the negligence of the defendant's servants the figs were lost. Plea: *non assumpsit.*

It was proved that, on the 14th of February, 1850, the defendant was employed by the plaintiffs, who are merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames Street, to the "Magnet" steamer, which lay in the River Thames, and that as the figs were on board the lighter, which was proceeding with them to the "Magnet," the lighter was run down by the "Menai" steamer and the figs all lost. It was proved that the defendant had a counting-house with his name and the word "lighterman" on the doorposts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him, and that the defendant was a lighterman and not a wharfinger.

Alderson, B. Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a

[1] *Compare:* Bell *v.* Pidgeon, 5 Fed. 634; Crosby *v.* Fitch, 12 Conn. 410; Fish *v.* Clark, 49 N. Y. 122; Pennewell *v.* Cullen, 5 Harr. 238; Moss *v.* Bettes, 4 Heisk. 661; Spencer *v.* Daggett, 2 Vt. 92. — Ed.

man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, "lighterman" painted at his door, and he offers to carry for every one.[1]

CITIZENS' BANK *v.* NANTUCKET STEAMBOAT CO.

Circuit Court of the United States, 1811.

[2 *Story*, 16.[2]]

Story, J. This cause has come before the court under circumstances, involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment.

The suit is in substance brought to recover from the Steamboat Company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence; and are no otherwise ascertained, than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know. The libel is not *in rem*, but *in personam*, against the Steamboat Company alone; and no question is made (and in my judgment there is no just ground for any such question), that the cause is a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and, therefore, it is properly to be entertained by this court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of, before we consider those, which constitute the main points of the controversy. In the first place, there is no manner of doubt, that steamboats, like other vessels, may be employed as common carriers, and when so employed their owners are liable for all losses and damages to goods and other property in-

[1] *Compare:* East India Co. *v.* Pullen, 2 Strange, 690; Brind *v.* Dale, 8 C. & P. 207; Liver Alkali Co. *v.* Johnson, L. R. 9 Ex. 338. — Ed.

[2] This case is abridged. — Ed.

trusted to them as common carriers to the same extent and in the same manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations, and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the drivers employed by them, to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*, they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend, that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence, to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily em-

ployed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see, how the court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining what the true understanding of the parties is, as to the character of the bailment.

In the next place, if it should turn out, that the Steamboat Company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the steamboat to another at their risk, as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter; upon the plain ground, that they are responsible

for the gross negligence of their agents within the scope of their employment.

[Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, the Steamboat Company were not, nor held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms; the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire; and money and bank bills, although known to the company to be carried by the master, were treated by them, as a mere personal trust in the master by the owners of the money and bank bills, as their private agent, and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers. . . .

Judgment for defendant.[1]]

LEVI *v.* LYNN AND BOSTON RAILROAD CO.

SUPREME COURT OF MASSACHUSETTS, 1865.

[11 *Allen*, 300.[2]]

TORT against a street railway corporation to recover the value of a box of merchandise.

At the trial in the Superior Court, before BRIGHAM, J., the plaintiff introduced evidence tending to show that on the 8th of July, 1864, she placed upon the front platform of one of the defendants' cars in Boston a box of merchandise, and then took her seat within the car to go to Chelsea, and paid the conductor her fare and also a certain sum as compensation for carrying the box to Chelsea. She was also allowed to introduce evidence, under objection, tending to show that two other persons had at other times paid to conductors of the defendants' cars money for the conveyance of merchandise to Chelsea in addition to their own fare, with the knowledge of the superintendent of the railroad.

The above are all the facts recited in the bill of exceptions.

COLT, J. The plaintiff resorted to the usual and proper mode of proving that the defendants had assumed the business of common carriers of merchandise upon their cars, and produced evidence that two other persons had paid money at other times to the defendants'

[1] *Compare:* Butler *v.* Basing, 2 C. & P. 613; Suarey *v.* George Washington, 1 Woods, 96; Dwight *v.* Brewster, 1 Pick. 50; Pender *v.* Robbins, 6 Jones L. 207. — ED.

[2] This case is abridged. — ED.

conductors for the transportation of merchandise, with a knowledge of the superintendent of the road. For anything that appears to the contrary in the exceptions, it may have been proved that these two other persons had so employed the defendants in repeated instances. The evidence was entirely proper to go to the jury, and, in the absence of anything to control or contradict it, would be sufficient to warrant them in finding that the defendants had assumed to be and were common carriers, when the plaintiff's box was delivered to them for transportation.

The jury were in effect instructed that, if they found that the defendants were common carriers, and that the plaintiff's box was delivered to them for transportation, and the price of transportation paid by her, they would be responsible for the delivery of the box at its place of destination. And these instructions were sufficiently correct and accurate.

If the defendants were proved to be common carriers the law supplies the proof of the contract, so far as regards the extent and degree of liability, and, the bailor having proved delivery to a carrier and loss, the burden is on the carrier to discharge himself from liability, within the exceptions which the law creates. No question seems to have been raised or instructions required in regard to the limit of the defendants' liability in this case, if regarded as common carriers. Clark *v.* Barnwell, 12 How. 272; Alden *v.* Pearson, 3 Gray, 342.

The question whether the plaintiff was herself negligent, in placing her property on the front platform of the car, and the point that she did not in fact part with the custody of the box, and so cannot charge the defendants with her loss, are not open to the defendants upon these exceptions, for it does not appear that any such question was raised or point made at the trial. Brigham *v.* Wentworth, 11 Cush. 123; Reed *v.* Call, 5 Cush. 14; Moore *v.* Fitchburg Railroad, 4 Gray, 465.

Exceptions overruled.[1]

COUP *v.* WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.

SUPREME COURT OF MICHIGAN, 1885.

[56 *Mich.* 111.[2]]

CAMPBELL, J. Plaintiff, who is a circus proprietor, sued defendant as a carrier for injuries to cars and equipments, and to persons and animals caused by a collision of two trains made up of his circus cars, while in transit through Illinois. The court below held defendant to

[1] *Compare:* Knox *v.* Russ, 14 Ala. 249; Adams Express Co. *v.* Cressap, 6 Bush, 572; Clark *v.* Rochester, &c. R. R., 14 N. Y. 570; Spears *v.* Lake Shore & M. S. R. R., 67 Barb. 513; Kemp *v.* Coughton, 11 Johns. 107. — ED.

[2] Opinion only is printed. — ED.

the common-law liability of a common carrier and held there was no avoiding liability by reason of a special contract under which the transportation was directed. The principal questions raised on the trial arose out of discussions concerning the nature of defendant's employment, and questions of damage. Some other points also appeared. In the view which we take of the case the former become more important, and will be first considered.

Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. He owned special cars fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition.

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the 25th of July, 1882, a written contract was made at St. Louis by defendant's proper agent with plaintiff to the following effect. Defendant was to furnish men and motive power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches, being in all twenty-three cars from Cairo to Detroit with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition, leaving Cairo August 19, Delphi August 21, Columbia City August 22, exhibiting at Detroit August 23, and then to be turned over to the Great Western Transfer Line boats. Plaintiff was to furnish his own cars, and two from another company at Cairo, in good condition and running order. It was agreed that "for the use of the said machinery, motive power and men and the privileges above enumerated, plaintiff should pay $400 for the run to Delphi, $175 to Columbia City, and $225 to Detroit, each sum to be paid before leaving each point of departure."

It was further expressly stipulated that the agreement was not made with defendant as a carrier, but merely "as a hirer of said machinery, motive power, and right of way and the men to move and work the same; the same to be operated under the management, direction, orders, and control of said party of the second part [plaintiff] or his agent, as in his possession, and by means of said employes as his agents, but to run according to the rules, regulations, and time-tables of the said party of the first part."

The contract further provides that defendant should not be responsible for damage by want of care in the running of the cars or otherwise, and for stipulated damages in case of any liability. It also provided for transporting free on its passenger trains two advertising cars and advertising material.

The plaintiff's cars were made up in two trains at Cairo, and divided to suit instructions. The testimony tended to prove that two cars were added to the forward train by order of plaintiff's agent, but in the view we take the question who did it is not important. The forward train

was for some cause on which there was room for argument brought to a standstill, and run into by the other train, and considerable damage done by the collision.

Defendants insisted that plaintiff made out no case for recovery, and that the contract exempted them. Plaintiff claimed, and the court below held the exemption incompetent.

Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all.

The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.

The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage.

The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving

of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far in the absence of contract they would be liable in such a mixed employment where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business we need not consider.

It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in Mann *v.* White River Log & Booming Co., 46 Mich. 38, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage.

It is therefore needless to discuss the other questions in the case, which involve several rulings open to criticism. We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action.

The judgment must be reversed and a new trial granted.

The other justices concurred.[1]

[1] *Compare:* R. R. *v.* Glidewell, 39 Ark. 487. — Ed.

BUSSEY & CO. *v.* MISSISSIPPI VALLEY TRANSPORTATION CO.

SUPREME COURT OF LOUISIANA, 1872.

[24 *La. Ann.* 165.]

APPEAL from the Fourth District Court, parish of Orleans. THEARD, J.

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat 'Bee' and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion, and collision excepted) to Bussey & Co., at New Orleans, Louisiana, on levee or wharf boat, he or they paying freight at the rate annexed, or $700 for barge, and charges $267.50." . . . "It is agreed with shippers," the bill continues, "that the 'Bee' and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and cargo, in which they contended they were without blame; and that loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defences were raised by the answer which have been abandoned.

The court *a qua* gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, $15,272.60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument,

"*First* — That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"*Second* — That they are liable, if liable at all, only in case of gross carelessness.

"*Third* — That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness — as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"*Fourth* — That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a towboat under the circumstances of this particular case is a common carrier has been long settled in the affirmative

in Louisiana; and the reasoning by which Judge Matthews supported this conclusion in the leading case of Smith *v.* Pierce, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the Supreme Court of Massachusetts in the case of Sproul *v.* Hemmingway, 14 Pick. 1, in which Chief Justice Shaw was the organ of the court.

In the case also of Alexander *v.* Greene, 7 Hill, 533, the Court of Errors of New York seem to have been of the same opinion. Four of the senators in giving their reasons distinctly state their belief that the towboat in that case was a common carrier, and Judge Matthews' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice Bronson, whose opinion was thus reversed, in a subsequent case declares (2 Coms. 208) that nobody could tell what the Court of Errors did decide in Alexander *v.* Greene, but the facts remain as above stated, and the effect of the case cannot but be to fortify the authority of the decision in 1 La.

In addition to these authorities we have the weighty opinion of Mr. Kent who includes "steam towboats" in his list of common carriers, 2 Kent, 599, and of Judge Kane in 13 L. R. 399. On the other hand, Judge Story seems to be of a different opinion (Bailments, § 496), and Mr. Justice Grier differed from Judge Kane.

So, too, the Supreme Court of New York, in Caton *v.* Rumney, 13 Wend. 387, and Alexander *v.* Greene, 3 Hill, 9; the Court of Appeals of the same State in Well *v.* Steam Nav. Co., 2 Coms. 207; the Supreme Court of Pennsylvania in Leonard *v.* Hendrickson, 18 State, 40, and Brown *v.* Clegg, 63 State, 51; and the Supreme Court of Maryland in Penn. Co. *v.* Sandridge, 8 Gill & J. 248, decided that tugboats in these particular cases were not common carriers. We are informed that the same decision was made in the case of the "Neaffie," lately decided in the United States Circuit Court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy, except in the decision in 63 Penn., is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed *termini*. Such were the facts in some form as stated or assumed in Caton *v.* Rumney, 13 Wend., and Alexander *v.* Greene, 3 Hill, cited by Judge Story in the case of the "Neaffie," and in the cases above quoted from 2 Coms., 18 Penn. St., and 8 Gill & J.; and it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is

where she plies regularly between fixed *termini*, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail. § 495. And it was probably to a towboat employed in this way that Mr. Kent referred in the passage quoted above; and that the Supreme Court of Massachusetts had in mind in the 14 Pick.; and see also Davis *v.* Housen, 6 Rob. 259, and Clapp *v.* Stanton, 20 An. 495. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri (4 Martin, 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness"? In an employment requiring skill, it is the failure to exercise skill. New World *v.* King, 16 How. 475. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only, might be swiftly fatal, for but a single plank intervenes between the costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester, to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and charges, and a small amount realized from the wreck, to be $13,268.50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of thirteen thousand two hundred and sixty-eight dollars and fifty cents, with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.[1]

[1] *Compare:* The Neaffie, 1 Abb. C. C. 465; White *v.* Winnisimmet Co., 7 Cush. 155; White *v.* Mary Ann, 6 Cal. 462. — Ed.

PATE *v.* HENRY.

SUPREME COURT OF ALABAMA, 1833.

[5 *Stew. & P.* 101.]

IN this case, an action was commenced by Pate before a justice of the peace of Bibb County, to recover of Henry the sum of ten dollars penalty, for neglect of duty as a ferry owner. In this trial the justice rendered judgment in favor of the defendant, from which the plaintiff appealed to the County Court. In that court the proof was, that the plaintiff applied at the ferry to be put across the stream, after night, at about six o'clock; but the defendant had no ferryman to perform this duty, and that the plaintiff was not ferried over until the next morning. Upon this state of facts the judge below determined that, by law, the owner of a ferry was not bound to put any person across the river between dark and daylight.

TAYLOR, J. The Inferior Court, as it appears by the bill of exceptions, decided that the owner of a public ferry was not bound to put any person across the stream after night. This cannot be the intention of the statute regulating this subject. The phraseology of the act will not bear this construction, and it would be highly inexpedient that such should be the law. It would be useless to enter into a long discussion to show the inconveniences which would be attendant upon giving this latitude to ferry owners; it is enough to say the statute does not give it.

The counsel for the defendant dwells much upon the great hardship of requiring persons in this situation to expose themselves to the dangers attendant upon the transportation of persons, etc., during excessive darkness, the prevalence of high winds, or in the dead hour of the night. To require this would be hard. But it certainly would be equally so to permit a ferryman to stop a person travelling upon urgent business just at nightfall, when there might be a moon shining rendering it almost as light as it would be of a cloudy day, merely because he chose to do so.

There is no danger, however, to be apprehended by the ferryman. If the wind was high, or the night dark, when the application was made to him, so as to expose him to danger in an attempt to cross, he might show this to justify his refusal: and even were it late at night, after the usual bedtime, it might, under some circumstances, as where the ferry was some distance from his dwelling, and probably in many other cases, be a sufficient excuse.

The opinion of the Inferior Court was certainly wrong.

But it is contended the suit should have been upon the bond.

The statute expressly imposes the penalty of ten dollars upon any ferryman for "failing to do his duty," to be recovered by any person detained thereby, before a justice of the peace.

It is insisted, however, that it is not shown by the proceedings below that the defendant's was a public ferry.

The indorsement on the warrant states that the suit "is brought to recover ten dollars forfeited by the defendant as a keeper of a public ferry." The whole of the proceedings below, show that it was considered as a public ferry.

The judgment must be reversed; but as the defendant may be able to show some good reason for his conduct, the cause will be remanded, if his counsel wishes it; otherwise judgment will be rendered here for the ten dollars, forfeited under the statute.

THOMPSON *v.* MATTHEWS.

VICE-CHANCELLOR'S COURT, NEW YORK, 1834.

[2 *Edw. Ch.* 212.]

THE defendants, Charles S. Matthews, Charles Woods, and James Hall, were ordered to show cause on this day why an injunction should not issue, restraining them "from transporting or causing to be transported across the bridge from Harlæm across the Harlæm river any marble or stone in quantities exceeding at one time or in any one load the weight of two tons, until the further order of the court."

The bill in the cause was filed by Samuel M. Thompson, Samuel Flewelling, William F. Coles, and Isaac U. Coles, for and in behalf of themselves and the other owners and proprietors of the bridge.

THE VICE-CHANCELLOR. The motion for an injunction cannot be granted. The road across the bridge is undoubtedly a highway, though all persons and carriages passing must pay a toll: but, still, it is a public highway. The affidavits in opposition take very much from the force of the allegations in the bill. But this is a case in which the parties have legal rights. The bridge is a public one. If persons take improper loads and the bridge has been properly constructed, then the owners of it have a remedy by a special action on the case or in trespass for damage done; while, on the other hand, if passengers and their property should sustain an injury by a breaking from ordinary loads, the owners must respond in damages. The law affords a reciprocal remedy in all such cases; and I shall leave the parties to their legal right.

It is true, this court has jurisdiction to prevent irreparable injury; but the injury is not irreparable, where damages, as here, can be ascertained without difficulty, and compensation made in money. And I would observe, with respect to the tolls, that no equity arises from the circumstance of the complainants not being enabled to charge more than nine cents for a heavy load. This is a matter for the legislature;

and the complainants will have an opportunity of applying for an amendatory act, raising their tolls, before the contract, which the defendants have entered into and which requires this large quantity of marble to be transported, shall have been completed. *Motion denied.*

REX *v.* IVENS.

Monmouth Assizes, 1835.

[7 *C. & P.* 213.]

Indictment against the defendant, as an innkeeper, for not receiving Mr. Samuel Probyn Williams as a guest at his inn, and also for refusing to take his horse. The first count of the indictment averred that the prosecutor had offered to pay a reasonable sum for his lodgings; and the first and second counts both stated that there was room in the inn. The third count omitted these allegations, and also omitted all mention of the horse. The fourth count was similar to the third, but in a more general form. *Plea — Not guilty.*

Coleridge, J. (in summing up). The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to this case is this: — that an indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstance occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers, and supplying them with what they want. It is said in the present case, that Mr. Williams, the prosecutor, conducted himself improperly, and therefore ought not to have been admitted into the house of the defendant. If a person came to an inn drunk, or behaved in an indecent or improper manner, I am of opinion that the innkeeper is not bound to receive him. You will consider whether Mr. Williams did so behave here. It is next said that he came to the inn at a late hour of the night, when probably the family were gone to bed. Have we not all knocked at inn doors at late hours of the night, and after the family have retired to rest, not for the purpose of annoyance, but to get the people up? In this case it further appears, that the wife of defendant has a conversation with the prosecutor, in which she insists on knowing his name and abode. I think that an innkeeper has no right to insist on knowing those particulars; and certainly you and I would think an innkeeper very im-

pertinent, who asked either the one or the other of any of us. However, the prosecutor gives his name and residence; and supposing that he did add the words "and be damned to you," is that a sufficient reason for keeping a man out of an inn who has travelled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house. It has been strongly objected against the prosecutor by Mr. Godson, that he had been travelling on a Sunday. To make that argument of any avail, it must be contended that travelling on a Sunday is illegal. It is not so, although it is what ought to be avoided whenever it can be. Indeed there is one thing which shows that travelling on a Sunday is not illegal, which is, that in many places you pay additional toll at the turnpikes if you pass through them on a Sunday, by which the legislature plainly contemplates travelling on a Sunday as a thing not illegal. I do not encourage travelling on Sundays, but still it is not illegal. With respect to the non-tender of money by the prosecutor, it is now a custom so universal with innkeepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case, no objection was made that Mr. Williams did not make a tender; and they did not even insinuate that they had any suspicion that he could not pay for whatever entertainment might be furnished to him. I think, therefore, that that cannot be set up as a defence. It however remains for me next to consider the case with respect to the hour of the night at which Mr. Williams applied for admission; and the opinion which I have formed is, that the lateness of the hour is no excuse to the defendant for refusing to receive the prosecutor into his inn. Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive. The only other question in this case is, whether the defendant's inn was full. There is no distinct evidence on the part of the prosecution that it was not. But I think the conduct of the parties shows that the inn was not full; because, if it had been, there could have been no use in the landlady asking the prosecutor his name, and saying, that if he would tell it, she would ring for one of the servants. *Verdict — Guilty.*

Park, J., sentenced the defendant to pay a fine of 20*s*.[1]

[1] *Compare:* Hawthorne *v.* Hammond, 1 C. & K. 404; Queen *v.* Rymer, 2 Q. B. D. 136; Kisten *v.* Hildebrand, 9 B. Mon. 72; Atwater *v.* Sawyer, 76 Me. 539. — Ed.

LAMOND *v.* THE GORDON HOTELS, LIMITED.

COURT OF APPEAL, 1897.

[1897. 1 *Q. B.* 541.[1]]

LORD ESHER, M. R. The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in and given rooms, and she stayed there for a period of ten months. It was then intimated to her that the direction wished her to leave, but this she refused to do. Then notice was given to her requiring her to leave, and as she still refused, advantage was taken of her being out of the hotel, and her things were brought down and put outside, and on her return she was refused admittance.

The foundation of her action is that she was not allowed to stay on at the hotel. It was tried before the county court judge of Brighton without a jury, and he has arrived at certain conclusions of fact. He has found that the plaintiff was taken into the hotel as a traveller according to the custom of England, and to find that he must have also found that the hotel carried on business according to the custom, so that the proprietors were bound to take in every one that came and asked for lodgings, if there was room for them. He finds that she stayed so long at the hotel that at last notice was given to her to leave; and his findings are equivalent to saying that, when notice was given, she was no longer a traveller, nor entitled to be treated as such under the custom. If this is a question of fact it is not subject to appeal.

The learned judge must have found that the proprietors of the hotel held it out to the public as an inn that would take in any traveller who came, provided there was room to do so. I think it is a question of fact what was the intention of those who carried on the business of the hotel, and the county court judge has stated what that intention was. Such a finding in this case does not affect the position of other hotels, and I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England — at any rate, such a matter would be a question of fact.

Then comes the question whether the plaintiff went to the hotel in the capacity of a traveller. That is also a question of fact which the county court judge has determined.

The plaintiff has brought this action relying on the custom of England, and not on the point raised now for the first time of a contract outside the custom. The question is whether it is the law that if a person goes to an inn in the character of a traveller that person retains the same character for any time however long. If so, the law would be contrary to the truth; and I will never submit, unless compelled by an Act of Parliament, to say that a thing shall be deemed to be that

[1] Opinions only are printed. — ED.

which it is not. Therefore, the question whether a person has ceased to be a traveller seems to me again to be a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which show that the length of the stay does not prevent the guest being a traveller, as, for instance, where it arises from illness; but it is wrong to say that length of time is not one of the circumstances to be taken into account in determining whether the guest has retained his character of traveller. In my opinion there was in this case evidence of facts which justified the county court judge in saying that the plaintiff had ceased to be a traveller. If this is a question of fact, there is no appeal from the decision of the judge; but even if there were an appeal, I agree with the conclusion to which he came, that the evidence showed that the plaintiff was no longer a traveller. Her case, therefore, was not within the custom, and the relations between her and the innkeepers were not under the custom.

It is put as an objection that if the relation between them is changed the rights of the innkeeper against the plaintiff had ceased. I do not say whether this is so, but the argument is not sufficient to prevent the conclusion at which I have arrived, that the relation may be altered from the original one of traveller and innkeeper.

Then we were asked to imply a contract or agreement by both parties, by which the innkeeper contracted to lodge the plaintiff so long as she wished to stay, upon the same terms as those upon which she was taken in, so that she was under no obligation to stay an hour longer than she chose, but he was bound to keep her so long as she liked to remain. To my mind such a contract cannot have been the intention of the parties when the relationship commenced.

I think, therefore, there is no ground for disturbing the decision in this case, and the appeal must be dismissed.

Lopes, L. J. The law of England imposed exceptional liabilities on an innkeeper and gave him exceptional rights. But these exceptional liabilities and rights applied only as between the innkeeper and those persons who came to the inn in the character of travellers. This is shown clearly by the old form of writ against an innkeeper for refusing to supply food and lodging, and from the old form of declaration, which will be found in Bullen and Leake's Precedents of Pleading. The question before us is, in what character was the plaintiff living at the inn when she received notice to quit it? Was she there as a traveller, or had she ceased to be a traveller and remained in some other capacity? I cannot help thinking that this is a question of fact on which the finding of the judge was conclusive; but I do not desire to rest my judgment on that ground, which may be regarded rather as technical. In my opinion there is no such rule as is suggested, that a person who comes to an inn as a traveller and remains there must remain as a traveller. In my opinion the learned judge was right when he found that the plaintiff when she was required to leave had ceased to be a traveller, and that, therefore, the innkeeper was fully justified,

after giving reasonable notice, in acting as he did. His judgment and that of the Divisional Court supporting it should be affirmed.

CHITTY, L. J. The plaintiff's claim is founded on the liability imposed by the general custom of England on the keeper of a common inn. There is no question of contract raised between the parties. The county court judge found, either as a question of fact or a mixed question of law and fact, that the defendants' hotel was an inn, and from that finding there is no appeal. Starting from that point, he considered whether the plaintiff, after being in the hotel for a period of ten months and considering all the circumstances of the case, still retained the character of a traveller which he attributed to her when she first went to the inn; and he decided, and this also may be a question of mixed fact and law, that she did not retain it. If this is a question of fact there is nothing more to be said on the appeal. The plaintiff's counsel, however, tried to treat it as a question of law; and turn his proposition about as you will, it still comes to this, that if a person once enters an inn as a traveller he can remain there in that character as long as he pleases. With reference to this proposition, though there are many authorities on the question of the common-law liability of an innkeeper, no suggestion to this effect can be found, and in my opinion it is not the law. It may be a difficult question to determine in any case when the character of traveller ceases and that of lodger or boarder begins; but in this present case I think the judge was entitled on the evidence to come to the conclusion at which he arrived, that the plaintiff had ceased to be a traveller. The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question as was before the judge. If the character of traveller is continuous, it would follow that the plaintiff would have a right to reside at the hotel all her life, provided she conformed to the regulations and paid her bills, but that she could leave at any moment, while the landlord would be bound to provide lodging without any power to give notice to her to leave. This is a startling proposition, and, as it is moreover unsupported by authority, I cannot assent to it. It is hardly necessary to say anything about the suggested implied contract. The action was not founded on it, and the proposition itself will not bear examination. For these reasons I concur in the judgments already delivered.

Appeal dismissed.[1]

[1] *Compare:* Moore *v.* Beech Co., 87 Cal. 483; Davis *v.* Gay, 141 Mass. 531; Horner *v.* Harvey, 3 N. M. 197; Howth *v.* Franklin, 20 Tex. 798; Clary *v.* Willey, 49 Vt. 55. — ED.

EVERGREEN CEMETERY ASSOCIATION *v.* BEECHER.

SUPREME COURT OF CONNECTICUT, 1885.

[53 *Conn.* 551.[1]]

PARDEE, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. Because of this joinder they demur. But we think that it is in harmony with our practice in analogous proceedings and with the spirit of the Practice Act, and that it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights. Each carries his own burden only; he is not made to carry that of any of his associates. Therefore the complaint, so far forth as this objection is concerned, is sufficient.

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining, and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless, it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain.

[1] Opinion only is printed. — ED.

The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion.

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.[1]

WEYMOUTH *v.* PENOBSCOT LOG DRIVING CO.

SUPREME COURT OF MAINE, 1880.

[71 *Me.* 29.[2]]

AN action on the case to recover damages of the defendant corporation for carelessly and negligently preventing the plaintiffs from seasonably delivering 751,290 feet of spruce logs, and 48,780 feet of pine logs, cut and hauled by them in the winter of 1872–3, on landings on the stream between Caribou lake and Chesuncook lake, at the outlet of Chesuncook lake, in consequence of which 600,000 feet of the plaintiff's logs were not driven to market in the year 1873, but were left behind in an exposed position, where many were lost, and there was a great shrinkage in quantity and quality.

The writ is dated December 8, 1877.

Plea, general issue.

The verdict was for plaintiff for $1,496.51, and the defendants move to set the same aside as against law, and against evidence and the weight of evidence. The defendants also allege exceptions to refusals of the presiding judge to give certain requested instructions.

DANFORTH, J. It is contended that this action is not maintainable, and the court was requested to instruct the jury that, "The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive, the corporation is to be paid."

It is claimed that this instruction is required by a fair construction of the terms of the charter.

It is unquestionably true, that when any doubt exists as to the meaning of any language used, it is to be interpreted in the light afforded by the connection in which it is used, the several provisions bearing upon

[1] *Compare:* Lumbard *v.* Stearns, 4 Cush. 60. — ED.

[2] This case is abridged. — ED.

the same subject matter, the general purpose to be accomplished, as well as the manner in which it is to be accomplished.

It is also true that when the terms of an act are free from obscurity, leaving no doubt as to the meaning of the legislature, no construction is allowed to give the law a different meaning, whatever may be the reasons therefor.

The first ground taken in support of the request, is that the defendant company is a "mutual association combined together for mutual benefit to aid each other in the accomplishment of a given object in which all are equally interested," and the inference drawn is, that each is equally responsible for the doings of all. This view is endeavored to be sustained by the alleged facts that "it is not a stock company, has no capital, no power to do anything for others than its own members, no permanent stockholders, no stock, and no provision for raising money to pay any charges or expenses except the expense of driving."

If these suggestions are found to be apparent from the provisions of the charter, they, or a portion of them, will be entitled to great weight, and might perhaps be considered conclusive. The most important of them are not so found. It may be that the charter was obtained for the mutual benefit of the log owners. Nevertheless, by its express terms it constitutes its members a corporation with all the rights, liabilities, and individuality attached to corporations of a similar nature. The first section provides that certain persons named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and as such it may sue and be sued, prosecute and defend, may hold real and personal estate, not exceeding fifty thousand dollars at any one time, and may grant and vote money. Thus the charter gives all the attributes of a corporation and none of a simple association. It may not have stock, and if not, it can have no stockholders. But that is not necessary to a corporation, and does not constitute an element in any approved definition of it. If it has no stock, it may have a capital, and though it may assess only a certain amount upon the logs driven, the charter does not preclude money from being raised in other ways. Nor is the amount which may be assessed upon the logs driven limited to the expense of driving. The amendment of 1865 provides for a toll, not exceeding a certain amount, upon the logs driven "sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company."

Nor do we find any provision "that it may not do anything for others than its own members." By the charter it may drive all the logs and other timber to be driven down the west branch of the Penobscot river, while all owners of such logs may not be members of the company. It does not appear whether the first corporators were such owners or otherwise. In the charter we find no provision prescribing the qualification of the members. The by-laws provide, not that the member shall be an owner of logs to be driven, but he must be an "owner of timber lands or engaged in a particular lumbering operation on the west branch

of the Penobscot river, or its tributaries," and can then be a member only on application and receiving a majority of the votes of the members present. Hence the company may be acting for others, not members, while its members may not own a single log in the drive.

There is then no ground upon which this defendant can be held to be a mutual association, acting as a partnership for the benefit of its own members only, each bound by the acts of the others, but it must be held as a corporation acting as such, for the benefit of its own members, perhaps, but also for such other owners of logs as may not choose to become members, or may not possess the required qualification of "being a land owner, or a practical operator," or may not be able to get the requisite number of votes to make them such. It is a significant fact that in this case it does not appear that the plaintiff is a member of the defendant company, and until that does appear he cannot be subjected to the liabilities of one.

The fact that there is no specific provision for raising money to meet such a liability, as is here claimed, is immaterial. It cannot affect the plaintiff's right to a judgment. The liability of the log owners to be assessed, and its limits, are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter, and if the plaintiff, after having obtained judgment, is unable to find means wherewith to satisfy it in accordance with the law, he will simply be in the condition of many other judgment creditors before him who have paid largely for that which affords them no benefit.

It is further contended that the action cannot be maintained, because, while the defendant under its charter has the right to drive all the logs to be driven, the obligation to do so is not imposed upon it. In other words, by the provision of the charter, it is left optional with the company to drive such as it may choose to do.

The language is, "and said company *may* drive all logs and other timber that may be in the west branch of the Penobscot river," &c., and it is contended that the word "may" must be construed as permissive and not as imperative. If any argument were needed to show that such is its proper construction, it would seem that the able and exhaustive discussion of this point by the counsel, would leave no room for doubt. The charter was granted as a privilege and not for the purpose of imposing an obligation, and when granted it has no binding effect until accepted by those for whom it was intended. But when accepted it becomes of binding force and must be taken with all its conditions and burdens, as well as its privileges. It cannot be accepted in part, but must be taken as a whole.

In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but "all" the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only

from all other corporations, but excludes the owner as well. If this exclusion was beyond the power of the legislature, it is not for this defendant to complain, for the right has been given to and accepted by it. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all*, or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do.

Motion and exceptions overruled.[1]

BRUSH ELECTRIC ILLUMINATING CO. *v.* CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY CO.

Supreme Court, New York, 1891.

[15 *N. Y. S.* 81.]

Action by the Brush Electric Illuminating Company against the Consolidated Telegraph and Electrical Subway Company. Plaintiff moves for an injunction.

Ingraham, J. The judgment demanded by plaintiff in this action is that the defendant, its officers, agents, and servants, and all others having notice, be perpetually enjoined and restrained from removing, cutting out, or in any manner whatsoever interfering with the cables and conductors or the property of the plaintiff, and from interfering with the plaintiff, or its officers, agents, and servants, in operating or maintaining the said cables and conductors, and in having access to them or any of the plaintiff's property in the subways of the defendant, or elsewhere, and that this court determine and adjudge what would be a just and reasonable rental for the use of the ducts and subways by the plaintiff and the terms upon which such rentals must be paid, and that defendant be enjoined from committing any of said acts during the pendency of the action. An inspection of the complaint shows that the theory upon which the plaintiff brought the action was that in some way this court had power to fix what, in its judgment, would be a reasonable rental for the plaintiff to pay for the use of the ducts occupied by it. It seems to me clear that this court has no such power to fix or determine what rental plaintiff should pay, or what would be a reasonable compensation to be paid by plaintiff, for its use of the subways. The defendant has constructed these subways in pursuance of two contracts, known as the contracts of July, 1886, and of April, 1887. The

[1] *Compare:* Mann *v.* Log Co., 46 Mich. 38. — Ed.

contract of April, 1887, was, in terms, a modification of the contract of 1886, and under its provisions the defendants were authorized to build, equip, maintain, and operate the subways in the contract mentioned and referred to. The defendant, by the contract, agreed that spaces in said subways shall be leased by the parties of the first part (the board of electrical subways) to any company or corporation having lawful power to operate electrical subways in the streets in the city of New York that may apply for the same. It does not appear, however, that the board have ever acted under this authority. The contract, however, further provides that the party of the second part (this defendant) may fix a fair scale of rent to be charged, but the scale of rents or any charges fixed or made by defendant shall at all times be subject to the control, modification, and revision by the board of electrical control, and that no contract shall be made between the party of the second part (the defendant) and any company or corporation on any terms which shall not require the payment by such other companies or corporations of rents at the rates so fixed. This contract was expressly ratified by chapter 716, Laws, 1887, and it must control the right of the defendant to the use of the subways constructed by the defendant. It will be seen that the provisions of this contract gave to the defendant in the first instance the authority to fix a uniform rate to be paid by all persons occupying its subways. That rate must be a fair one, but the corporation is to say, in the first instance, what is a fair charge for the use of the subway; and it is clear that until the rate fixed is modified by the board of electrical control, who are the successors of the commissioners of the electrical subways, the rate so fixed must be paid by all persons using the subways. It is thus left to the commissioners to determine whether or not the rate fixed by the defendant is a fair and reasonable rate, and this court is given no power to review the exercise of that discretion; and since the commencement of this action the board of electrical control has passed upon the question, and fixed the rent that the plaintiff is to pay for the use of the subways. I think, therefore, that the court cannot determine what would be a just and reasonable rental for the use of the subways by plaintiff. Nothing in section 7 of the act of 1887 would justify the court in reviewing the action of the board of electrical control, for it was the evident intent of that section to give to the court power by *mandamus* to compel the defendant to comply with its contract, and furnish just and equal facilities to corporations applying for the use of the subways, not to fix the rent that was to be paid, which was, by the express terms of the contract, to be fixed by defendant, subject to the review of the board, and the rate thus fixed must be paid by each corporation using the subways.

Nor do I think that the plaintiff would be entitled to an injunction restraining the defendant from removing, cutting out, or in any manner interfering with the cables and conductors of the plaintiff. The exact relation that exists between plaintiff and defendant is not easy to determine. The defendant being the owner of these subways, or ducts,

built under the surface of the streets in the city of New York, the plaintiff being desirous of using such subways for its wires or cables with which to supply electricity to its customers, presented to the defendant an instrument in writing whereby application was made for space in the electrical subway (specifying the street or avenue) for the term of one year, to be used for electrical light and power purposes. In some of these applications the rate or rental was fixed at $1,000 per duct per mile per annum; in other applications the amount of rent was not mentioned. The rates fixed by defendant had, however, been communicated to the plaintiff prior to making of the applications in question. No agreement or contract of any kind appears to have been signed by defendant, nor did it agree to allow the plaintiff to continue to use the duct or subway for any specified term. At most it was an acceptance of the application, and a verbal permission to use the duct for the purpose mentioned. So far as the plaintiff can claim under any grant or contract made by defendant, this would constitute a mere license to the plaintiff to use the subway or duct for the period mentioned. By such license the plaintiff acquired no interest in the subway, and, under the contractual relations between the parties, the defendant was, I think, entitled to revoke the license at any time, and upon the revocation of the license all rights of the plaintiff in the subway ceased. The distinction between a license and an easement is stated in Wiseman *v.* Lucksinger, 84 N. Y. 42, and I think, under the rule there laid down, this permission to use these ducts could be nothing more than a license, and revokable at the pleasure of the licensor.

The plaintiff, however, claims that the defendant is a *quasi* public corporation, and has only such rights as are given to it by charter, and, as it is nowhere expressly given the right to withdraw the plaintiff's wires from its ducts, when they are once there it must allow them to remain there forever; and the only remedy that the defendant has against the plaintiff, or any one using its ducts, is an action at law for the recovery of the rent reserved. It has been held, however, that this principle has reference to remedies or processes of a judicial nature only, and does not affect the right of a person to do such material acts as are necessary to protect his rights. Jordan, etc. Co. *v.* Morley, 23 N. Y. 554. But the statutes and contracts in question conferred upon defendant no remedy in case of the refusal of a person using its subways to pay the rate fixed, and I can see no reason why it should not have the same rights that any other person would have under similar circumstances. It seems to me, however, that this position arises out of a misconception of the defendant's real position. The defendant is not a common carrier, nor has it received from the State a franchise such as is conferred upon a ferry company or a turnpike road. Defendant, it is true, obtained permission from the public authorities to build these subways in the public streets, and it has bound itself by contract to furnish to such corporations or individuals as have authority to use the public streets for electrical purposes the use of its

subways, but such obligation rests entirely upon its contract under which it received its authority to build its subways. Irrespective of that contract, and section 7 of the Acts of 1887, the plaintiff would have no right, against the will of the defendant, to use its subways, nor would the public authorities, nor the courts, have power to compel the defendant to give any rights to the plaintiff. Whatever right, therefore, the plaintiff acquired, it is under the contract under which the defendant had authority to build the subways, and the statutes under which such contract was made, and there can be nothing found in these statutes or contract that would justify the claim of the plaintiff. On the contrary, the utmost care is taken to provide for the payment of compensation to the defendant for the use of the subways, and defendant is expressly prevented from giving any one the right to use them, except upon the payment of the rate fixed; and to say that a corporation getting permission to use the subways upon an agreement to pay the rate fixed for its use, under the provisions of the statute, could, by simply refusing to pay, defeat the express provisions of the contract by using the subway without paying for it the rate fixed or paying a less rate, would subvert the whole scheme under which the subways have been built.

The conduct of the plaintiff has not been such as to commend it to the favorable consideration of a court of equity. Although well knowing the rates fixed by defendant for the use of its subways, and where in the application the amount of rent is stated, no application was made to the board of electrical control to review the action of the defendant in fixing the rent, nor did the plaintiff pay or tender to the defendant any sum as compensation for the use of the subway by it. It simply held on to the subway, paying nothing for its use until the defendant threatened to revoke the permission given to use the subway, and then, without paying or offering to pay to the defendant anything, it applies to the court for an injunction, under which it could continue to use the subways indefinitely, without paying anything for the right it enjoys. Under such circumstances, it would require a clear case, and one free from doubt, to justify the interference of the court. I have examined carefully the elaborate arguments submitted on behalf of the plaintiff, and, while it has been impracticable to notice all of the points made, I have come to the conclusion that upon no ground can the plaintiff be entitled to any relief in this action. The motion for injunction must therefore be denied, and temporary injunction vacated.

HAUGEN *v.* ALBINA LIGHT AND WATER CO.

SUPREME COURT OF OREGON, 1891.

[21 Ore. 411.[1]]

THIS is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook Street, and allowing him to connect a service-pipe therewith, &c. The facts alleged in substance are these: That the defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water; that it is operating under a franchise granted to said company by the council of the city of Albina, by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Company, its successors and assigns, be and are hereby granted the right and privilege of laying pipes through the streets of the city of Albina, for the purpose of conducting water through the city. Section 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for conducting the water shall be under the surface or level of the established grade eighteen to twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers; provided, that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city; provided further, that said water company shall in no case charge more than one dollar per month for the first faucet and fifty cents for each additional faucet in the same building, for family use or at a private dwelling house," &c. That the purpose and object of granting to said company the right to lay water-mains in the streets of said city, was that the citizens of said city might be furnished with a supply of pure and wholesome water; that by virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook Street in the then city of Albina, from the east line of the original townsite of the city of Albina, to the west line of Twenty-fourth Street in Irvington, and connected the said main with the main on Margaretta Avenue in said city, and for nearly a year past has been pumping water and conducting it through said main on Tillamook Street to supply the citizens of Irvington residing east of Fourteenth Street; that the defendant utterly refuses to allow persons residing on Tillamook Street between the east line of the original townsite of Albina and Fourteenth Street in Irvington, to tap said main, and refuses to supply them with water therefrom; that the plaintiff resided on Tillamook Street between the points above named, and is the owner

[1] This case is abridged. — ED.

of lot 2, block 126, of Irvington; that said lot abuts on said Tillamook Street, and the plaintiff is constructing a dwelling thereon, and is desirous of securing a supply of water from the water-mains of said street, that being the only source of water supply for said premises; that the plaintiff has repeatedly requested the defendant to supply him with water from said main, but has always been refused; that on the eleventh day of July the plaintiff tendered said defendant two dollars and fifty cents, the regular fee charged by the defendant for tapping a water-main with a service pipe, and demanded from the defendant to be connected with said water-main in Tillamook Street, and to be supplied therefrom with water, and that said defendant refused to accept said tender, and refused to connect the plaintiff's premises with said main, and refused to supply him with water therefrom; that said refusal is wilful, and is done for the avowed purpose of debarring the residents on said Tillamook Street, between the original townsite of Albina and Fourteenth Street, and particularly the plaintiff, from the use of water from said main; that the plaintiff is without any legal remedy in the premises except the writ of mandamus, etc.

LORD, J. From this statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon, and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge therefor shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers, but that it contains no provision requiring it to supply the city or its inhabitants with water, hence the ordinance imposes no duty upon the company to furnish water to any one.

In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city by its ordinance granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed, without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitant of the city with water." . . .

It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right

to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the State, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It was not organized to lay pipes, but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as VAN SYCKEL, J., said, "is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

We discover no error, and the judgment must be affirmed for the plaintiff, making the writ peremptory.[1]

[1] *Compare:* Water Works *v.* Schottler, 110 U. S. 354; Water Co. *v.* Fergus, 178 Ill. 571; Olmstead *v.* Morris Aqueduct, 47 N. J. L. 311; People *v.* Water Co., 56 Hun, 76; Griffin *v.* Water Co., 122 N. C. 206. — ED.

SLOSSER *v.* SALT RIVER VALLEY CANAL CO.

SUPREME COURT OF ARIZONA, 1901.

[65 *Pac. Rep.* 332.[1]]

SLOAN, J. . . . The proof shows that plaintiff and his grantors have cultivated the land which he now owns from 1871 to 1880, under various canals in which plaintiff and his grantors were the owners of water rights. Since 1880, with the exception of one or two years, whatever water plaintiff has had for the irrigation of his land has been obtained from the Salt River Valley canal. The circumstances under which plaintiff changed his use from the Farmers' canal to the Salt River Valley canal are shown to have been the difficulty of maintaining the Farmers' canal, and the scarcity of water at its head, due to the diversion by the defendant company and other companies owning canals which headed further up the river. It is contended by the defendant that the abandonment of the Farmers' canal by its water-right holders, including the plaintiff, operated as an abandonment of their appropriations of water. Whatever may be the status of other water-right holders in the Farmers' canal, the defendant company, as late as 1890, in the suit known as "Wormser against the Salt River Valley Canal Company," tried in the court below, which case involved the rights of various canals in the Salt River Valley to divert the water from Salt River, acknowledged plaintiff's right as an appropriator of water, by setting up such right, introducing proof to the same, and obtaining an adjudication in its favor, sustaining its right to divert and carry water necessary for the irrigation of plaintiff's lands. If plaintiff had not lost his right as an appropriator of water by obtaining water from the Salt River canal from 1880 to 1890, it cannot be very well contended that under the same circumstances his right was lost to him between 1890 and 1896, when he was first denied the right of obtaining water from the defendant's canal. Forfeitures are not favored in law, and we hold, therefore, that the circumstances under which plaintiff ceased to obtain water from the Farmers' canal, and his use of water from the defendant's canal, coupled with the acknowledgment as late as 1890 by the defendant company of his right as an appropriator, do not show such forfeiture, but, on the contrary, establish his status as a valid appropriator of water from the Salt River. We do not hold that the plaintiff has acquired any contractual right to the service of said company which would entitle him to compel from said company the delivery of water for the irrigation of his lands, by virtue of such contractual relation, whenever the company confines its diversion and delivery of water to its stockholders to be used by the latter upon lands

[1] This case is abridged. — ED.

owned or possessed by them. On the other hand, we hold that his rights in the premises, so far as the defendant company is concerned, rest upon the fact that the defendant was not, at the time of plaintiff's application for water, confining its service to supplying its water-right holders for the irrigation of lands which they owned or possessed. In determining, however, whether plaintiff, as against others similarly situated, so far as the company is concerned, was entitled to the service of the company, under the law of prior appropriation, and the duty of water companies which occupy the relation of public agency in the diversion and carriage of water, we must look to the date of his appropriation, and therefore his priority of right. We think the denial by the defendant of plaintiff's application, under the circumstances shown by the record, was unwarranted, and he should have been accorded this right in preference to the holders of leases from the shareholders for use upon lands not owned or possessed by said shareholders, who were subsequent appropriators.

The importance of the questions presented by the record is such that we feel called upon to define with certainty the position we have taken, and to this end to give a brief résumé of the points decided, with a statement of those which we do not decide, which grow out of a consideration of the points decided in a collateral way, although not necessary in arriving at the result reached: We hold that the ownership and possession of arable and irrigable land are essential, under the statutes, for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. We hold that a corporation not the owner or possessor of arable and irrigable land may lawfully construct a dam, canal, or other conduit of water, and divert from such stream water for purposes of irrigation, but that in so doing it becomes in no sense an appropriator or owner of the water so diverted. Its status is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform such service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water-right holders, or with whom it has not bound itself by contract to permanently render such service. If it confines its service as the private agent of certain appropriators, it cannot be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contracts, and hence becomes a public agency, it cannot, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation. We further hold that a shareholder in such a company, who is also a water-right holder by virtue of his ownership of such share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water right, may not assign such water right to another, to be used upon lands which the assignor does not own or possess, for any particular season, so as to

confer upon the assignee his priority of right, and that such company does not possess the right to discriminate in favor of such holders, as against other appropriators of water under its canal, who were prior in right. In other words, a water right, to be effective, must be attached to and pertain to a particular tract of land, and is in no sense a "floating" right. We do not wish to be understood as holding that a water right which is so attached becomes inseparable from such land. That is to say, we do not hold that a prior appropriator of water may not convey his prior appropriation to another, without the land, so as to confer upon his vendee of such water right all the rights which the vendor may possess, provided such vendee makes a beneficial use of such water right upon lands which he owns or possesses. But we desire to be understood simply as holding that, so long as a water right is attached to a particular piece of land, it cannot be made to do duty to such land, and as well to other land not owned or possessed by such water-right holder, at the will or option of the latter. In the briefs, as well as in the very able and elaborate argument made by counsel for appellee, the right of shareholders to do this, and the duty of the defendant company to recognize the right, have been strenuously argued. In this, however, we think counsel confuses the right of an appropriator to sell or transfer by conveyance his water rights to another with the assumed right in question. To recognize the right of a prior appropriator to lease his water right independent of his land would, as we conceive, be subversive of the underlying principle of our water-right law. The right of alienation of a water right is one which is based upon the general right of property, and arises out of the necessity, in order that injustice may not be done to the owner, of permitting such alienation, for the reason that it frequently happens, through no fault of the owner, and by the operation of natural laws, that land to which water rights have been attached becomes unsuitable for cultivation. Floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and bowlders upon them; and other natural causes frequently render such lands not only unprofitable, but impossible of irrigation and cultivation. Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute. As the law must be certain and general in the matter of the right of conveyances, to admit the right of alienation under some circumstances must be the admission of that right under any and all circumstances. There was no principle of natural justice or of necessity that required the recognition of the right of a water-right holder to lease his water right for particular seasons, while retaining the land to which it is attached; for so long as he may use his right in the cultivation of such land he enjoys all that the law confers in the first instance by virtue of his appropriation. In considering our peculiar statutes, it is well to bear in mind the fact

that the only expression in our statutes upon the subject of priority of rights among appropriators from a common source for agricultural purposes is found in paragraph 3215 of the Revised Statutes, which reads: "That during years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors, the oldest titles shall have precedence always." And, while this section applies primarily to public acequias, it is significant, taken in connection with paragraph 3201, and negatives the idea that priority of appropriation is a mere personal right, which may be enjoyed otherwise than by its application upon particular lands. We hold further, therefore, that the defendant company, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable and irrigable land, not being itself an appropriator of the water carried, or the owner thereof, and dealing, as it was, with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not a water-right holder of the company, was entitled, upon the payment of the charge for similar service made to other non-water-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other non-water-right holders whose appropriations were subsequent in time, and that he is entitled to this service upon the same terms and conditions, so long as the defendant company continues to supply water to consumers under its canal who are not its water-right holders, whether upon the order of the latter or not, and thus continues to assume the status of a public agency in the diversion and carriage of water. We do not hold that the water-right holders in the Salt River canal are upon a parity of right with appellant and other non-water-right holders similarly situated to the service of the canal and to the water it diverts and carries. We assert that the canal company owes a first duty to supply the needs and requirements of the water-right holders. It is the surplus water remaining in the canal after this is done which is lawfully available to the latter class, and which must be disposed of by the company in the manner herein decided. Under the circumstances shown by the record, we hold that the appellant was wrongfully denied water for the irrigation of his lands at the time he made his application, in May, 1899; it being shown that the appellee company during that season was engaged in supplying other consumers within the flow of its canal who were non-water-right holders, and thus, confessedly, was diverting and carrying water in its canal in excess of that needed and required by its water-right holders for the irrigation of lands to which their water rights were attached, and it being further shown that appellant had the superior right to the use of such surplus water over other non-water-right holders thus supplied, by virtue of his ownership and possession of lands having an older right of appropriation. We

further hold that, so long as appellant continues to be the owner or possessor of said lands, upon paying the usual and reasonable charge therefor, he is entitled to the same service, whenever and so long as the appellee company undertakes to and does divert and carry in its canal water from Salt River in excess of that needed and required by its water-right holders for the irrigation of lands owned or possessed by such water-right holders, and to which such water rights are attached. The judgment of the trial court is reversed, and a judgment and decree will be entered in consonance with this opinion.

Doan, J., concurs.

Davis, J. I do not concur in the opinion of the court in this case.[1]

PORTLAND NATURAL GAS AND OIL COMPANY *v.* STATE.

Supreme Court of Indiana, 1893.

[135 *Ind.* 54.]

From the Jay Circuit Court.

Coffey, J. This was an action by the appellee against the appellant, to compel the latter by *mandamus* to supply the residence of the relator with natural gas, to be used for lights and fuel.

It appears, from the complaint, that the appellant is a corporation, duly organized under the laws of this State, for the purpose, among others, of supplying to those within its reach natural gas, to be used for lights and fuel. By permission of the common council it has laid its pipes, for that purpose, in the streets and alleys of the city of Portland, in this State, and has pipes laid in Walnut Street, of that city. The relator resides on Walnut Street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas.

In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service, but it refused, by its officers, to furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator.

The court overruled a demurrer to the complaint. It also sustained a demurrer to the second, third, and fourth paragraphs of the answer filed by the appellant. Over a motion for a new trial, the court awarded a peremptory writ against the appellant, requiring it to furnish the relator with gas, as prayed in the complaint.

These several rulings are assigned as error.

Very many of the objections urged against the complaint go to the

[1] *Compare:* Price *v.* Riverside Co., 56 Cal. 431; Wright *v.* Platte Co., 27 Col. 322. — Ed.

question of its uncertainty, and are technical in character. It has been so often decided that a demurrer is not the remedy for uncertainty that we need not cite authority upon the subject.

The vital question in the case relates to the right of the relator to compel the appellant, by *mandamus*, to supply his dwelling house with natural gas for lights and fuel.

There are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise, among which is the case of Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 75; but we think the better reason, as well as the weight of authority, is against this holding.

Mr. Beach, in his work on private corporations, volume 2, section 835, says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation, in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected."

Mr. Cook, in his work on Stock and Stockholders, section 674 (2d ed.), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all."

To the same effect are the following adjudicated cases: State *v.* Columbus Gas, &c. Co., 34 Oh. St. 572; New Orleans, &c. Co. *v.* Louisiana Light Co., 115 U. S. 650; People, *ex rel.*, *v.* Manhattan, &c. Co., 45 Barb. 136; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Williams *v.* Mutual Gas Co., 52 Mich. 499; *In re* Rochester Natural Gas, &c. Co. *v.* Richardson, 63 Barb. 437.

Our General Assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain, by an act approved February 20, 1889, Acts 1889, p. 22.

It has often been held that *mandamus* is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Am. and Eng. Encyc. of Law, 1284–1289; People *v.* Manhattan Gas Light Co., *supra;* Williams *v.* Mutual Gas Co., *supra;* Rochester Natural Gas, &c. Co. *v.* Richardson, *supra.*

In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of *mandamus.* As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all

those demanding gas, we intimate no opinion, as no such defence was interposed in this case.

It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto.

The second paragraph of the answer avers that at the time of the demand for gas alleged in the complaint, the relator was being furnished with natural gas by the Citizens' Natural Gas and Oil Mining Company, of Portland, Indiana, and that said company has ever since continued to furnish him with gas for fuel and lights, and is ready and willing to continue doing so, so long as he may pay for the same.

The third paragraph avers that the relator has no interest in the appellant, except what he may have and hold under the laws of the State in common with all other citizens of the city of Portland, as shown by the allegations in the complaint.

The fourth paragraph avers that the demand which the relator alleges he made on the appellant to furnish him natural gas is couched in general terms merely, and is not express and distinct, and does not clearly designate the precise thing which is required, but is vague, indefinite, and uncertain, as shown by the facts alleged in the complaint.

It is contended by the appellant, in support of the second paragraph of its answer, that in view of the facts therein averred it could not comply with the demand of the relator without a violation of the provisions of an act of the General Assembly, approved March 9, 1891, Acts 1891, p. 381.

It would seem to be a sufficient answer to this contention to say that it does not appear, by any averment in this answer, that it was necessary to change, extend, or alter any service or other pipe or attachment belonging to the Citizens' Natural Gas and Oil Mining Company, in order to supply the relator with the gas he demanded. For anything appearing from this answer, the gas required by the relator from the appellant could have been furnished without interfering with that company. But if it appeared otherwise, we would not be disposed to place a construction upon that act, which would give a gas company furnishing unsatisfactory service, or charging an unsatisfactory price for its service, the perpetual right to furnish gas to a particular building because it had been permitted to attach its appliances for the purpose of furnishing gas.

In our opinion, the court did not err in sustaining a demurrer to this answer.

The third paragraph of the answer was wholly insufficient to bar the relator's cause of action. It was not necessary that he should own an interest in the appellant, different from that held by other citizens of the city of Portland. It was sufficient that the appellant owed him a duty, in common with other citizens, to furnish him gas, which duty it had refused to perform.

The fourth paragraph of the answer states no issuable fact, and is clearly bad.

The evidence in the cause tends to support the finding of the Circuit Court, and we cannot, for that reason, disturb the finding on the evidence.

There is no error in the record for which the judgment of the Circuit Court should be reversed.

Judgment affirmed.[1]

CINCINNATI, HAMILTON AND DAYTON RAILROAD CO., *v.* VILLAGE OF BOWLING GREEN.

SUPREME COURT OF OHIO, 1879.

[57 *Oh. St.* 336.[2]]

ERROR to the Circuit Court of Wood County.

This action was brought in the Court of Common Pleas of Wood county, by the village of Bowling Green, to recover of the railroad company, plaintiff in error, a sum of money to reimburse the village for expenditures incurred by it in maintaining electric lights at certain places that by ordinance it had required the railroad company to maintain, and which the latter had neglected to do.

The village prevailed in the Court of Common Pleas, and the judgment there rendered in its favor was affirmed by the Circuit Court. To reverse the judgments thus rendered is the object of the proceedings in this court.

BRADBURY, J. . . . The ordinance in question specifies the points at which lights are to be maintained, and prescribes the kind of light, and the lamps and attachments to be employed. Electricity must be used, and the lamps and attachments must be in all respects similar to those used in lighting the streets of the village.

Plaintiff in error contends, that these provisions are unreasonable at the [point] of the power of determining the kind of light to be used, and of contracting on its own behalf; that the system of lamps and attachments which the ordinance prescribes are the subject of patents, and that the exclusive right to use them within the village, has been granted to the Bowling Green Electric Light and Power Company, and that, therefore, the plaintiff in error was put wholly within the power of such company by the ordinance, and will be compelled to pay whatever price the company chooses to establish or charge for the lights required.

[1] *Compare:* McCune *v.* Norwich Gas Co., 30 Conn. 521; Coy *v.* Gas Co., 146 Ind. 655; *In re* Pryor, 55 Kans. 730; Commonwealth *v.* Lowell Gas Co., 12 Allen, 75; Paterson Gas Co. *v.* Brady, 27 N. J. L. 245; Lanesville *v.* Gas Co., 47 Oh. St. 1; Shepard *v.* Milwaukee Gas Co., 6 Wis. 539. — ED.

[2] This case is abridged. — ED.

As respects the objection to the ordinance on account of its specifying the kind of light to be used, the statute — section 2495, Revised Statutes — among other provisions, requires the ordinance to "specify the manner in which such . . . railway shall be lighted." . . . This language seems broad enough to authorize the municipality to prescribe the kind of light to be employed for that purpose, — whether electricity, gas, or any other material or means that may be reasonably adapted to the purpose. The power of selecting the kind of light to be used can be exercised, of course, only where more than one kind is available. This power must reside somewhere, either in the railroad company or the municipality. The power to require the lighting of a railroad track is a branch of the police power of the State. If the terms of this section (2495) of the Revised Statutes, granting the power to municipal bodies should not be broad enough to expressly authorize them to prescribe the kind of light to be employed, yet, as the power to compel a railroad company to light its track at all, implies authority to require it to be efficiently done, it would seem to necessarily follow that, within reasonable limits, the power to prescribe the kind of lights rests with the municipal authorities. They, of course, in this respect could not cast an unreasonable burden on the railroad company.

Doubtless, an ordinance would cast upon a railroad company an unreasonable burden, and for that reason, would be void, if it prescribed an electric light, when the municipality contained no electric plant or other convenient means of generating electricity; otherwise, each municipality, large or small, through which a railroad might pass, could compel those who operate the road to erect a plant to generate the light thus required.

There was, however, in the village of Bowling Green, at the time the ordinance under consideration was passed, an electric light and power company, operating an electric plant, and therefore the means was at hand that would enable the railroad company to comply with requirements of the ordinance in this respect, and, therefore, such requirement was not in itself unreasonable.

Did the ordinance unreasonably limit the right of the railroad company to contract on its own behalf, or unreasonably place it within the power, and subject it to extortion at the hands of the electric light and power company, of which it must procure the lights ?

True, the railroad was required to adopt electricity as the means of illumination, and was confined to the kind of lamps and their attachment, then in use in said village. If the exclusive right to use within the village these lamps and attachments had been granted by the patentee to the Bowling Green Electric Light and Power Company, and if this company had an absolute power to fix the price that it could exact for the use of its light and lamps, then the contention of the railroad company would find strong support in reason and justice. It may be conceded, however, that the lamps and their attachments, as well as the system of lighting in use in the village of Bowling Green, were

all protected by patents, and that the Bowling Green Electric Light and Power Co. had the exclusive right to their use within that village, and yet the power of extortion would not follow, necessarily.

The light and power company have acquired in the village rights that are in the nature of a monopoly. The use to which it has devoted its property is one in which the public have an interest, and it requires the use of the streets and alleys of the village to conduct and distribute electricity to its lamps for illuminating purposes; and, in addition to this, power to appropriate private property has been conferred on it. Section 3471, Revised Statutes. Both reason and authority deny to a corporation clothed with such rights and powers, and bearing such relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. Beach on Corporations, sections 834, 835, 836; Zanesville *v.* Gas Light Co., 47 Oh. St. 1; Munn *v.* Illinois, 94 U. S. 113; Spring Valley Water Works *v.* Schottler *et al.*, 110 U. S. 347; Gibbs *v.* Baltimore Gas Co., 130 U. S. 408; The City of St. Louis *v.* The Bell Telephone Co., 96 Mo. 623; Nebraska *v.* The Nebraska Telephone Co., 17 Neb. 126; Central Union Telephone Co. *v.* Bradbury, 106 Ind. 1.

The Bowling Green Electric Light and Power Company was bound to serve all of its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted off others who had used its lights. The village had authority to fix the rates to be charged by the company for lights. Section 2478, Revised Statutes. If the village authorities should fail to act in this respect, and the plaintiff in error and the power and light company could not agree upon a price, the latter, by an appeal to the courts of the State could compel the former to furnish the lights at a reasonable price.

Therefore, the provisions of the ordinance requiring the plaintiff in error to use the lamps and attachments then in use in the village was not unreasonable. Notwithstanding that the sole right to use the lamps and attachments prescribed may have been vested in the Bowling Green Electric Light and Power Co., yet, as that company was bound to furnish light to all its patrons on terms that must be both reasonable and impartial, the ordinance requiring the use of such lamps and attachments should, in that respect, be deemed reasonable. The right to make contracts on its own behalf is doubtless a valuable one to the plaintiff in error, and if there had been two or more electric light plants in the village, an attempt to dictate to plaintiff in error which of them it should choose might have presented an interesting question. There was but one, however, and the only choice open to plaintiff in error, was between building a new plant or taking light of the company then established in the village. If that company had an exclusive right to use the lamps and attachments prescribed, then no choice was open to the plaintiff in error, and it would be compelled to procure the lights of that company. This, however, from a practical point of view, was of little or no concern, because, while the circum-

stances surrounding the plaintiff in error compelled it to take the lights of this particular company, yet the latter was also compelled to furnish them at a reasonable price. The State, under these circumstances, must yield its police power, a power existing for the benefit of all its citizens, or the right of a railroad company to an unlimited power of contracting must give way. This is not the only instance in which its powers in this respect are curtailed for the public good. This is notably the case in respect of its power to contract concerning the transportation of freight and passengers.

The ordinance in question requires the lights to be furnished by the plaintiff in error, shall be kept lighted during the same hours that the street lamps of the village may be kept lighted; this we think is sufficiently definite to clearly inform the plaintiff in error of what was required of it in this respect.

The ordinance, we think, imposes no unreasonable burdens on the plaintiff in error. *Judgment affirmed.*[1]

FLEMING *v.* MONTGOMERY LIGHT CO.

SUPREME COURT OF ALABAMA, 1892.

[100 *Ala.* 657.]

COLEMAN, J. Appellant as complainant filed the present bill for the purpose of enjoining the respondent, the Montgomery Light Company, from removing its gas meter from the premises of complainant, and to enjoin the respondent "from refusing to furnish your orator gas." Complainant's rights are very clearly set forth in the bill and grow out of an agreement entered into in the year 1852 between the City of Montgomery and the John Jeffrey Company, by the terms of which the exclusive right and privilege of manufacturing and supplying gas for a period of fifty years for the city of Montgomery and its inhabitants was granted to the John Jeffrey Company, the said company agreeing on its part, "at all times to supply the inhabitants of the City of Montgomery, for private use, with a sufficient quantity of gas of the most approved quality." The Montgomery Light Company has succeeded to all the privileges and assumed all the obligations of the John Jeffrey Company, and the bill makes the further averment, "that it is the duty of the respondent under its charter to supply all applicants with gas and electric lights, one or both, at the option of the consumer." There is nothing in the agreement by which the Light Company may compel the inhabitants of the city or any one of them to use its gas and electric lights. Stripped of the statement of facts necessary to present the complainant's case in an intelligible form, the

[1] *Compare:* Andrews *v.* Electric Light Co., 53 N. Y. S. 810.

one question raised is, whether the assumption to supply the inhabitants of the city of Montgomery with gas, imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas, for inhabitants who do not use or consume gas, but who desire to be supplied "with meters and connections with the defendant's gas pipes so that in case an accident, which is apt to occur, should happen, they could use the gas."

A statement of the proposition suggests its answer. There can be no difference in principle between the case stated and the one in the bill, in which it is shown that at one time complainant used gas for lights, but at the time of filing the bill, and previous thereto, complainant used in his building electric lights furnished by a different company, or corporation, and was not a patron of defendant company, and the injunction was to make provision "to use gas" "in case an accident should happen to the electric lights in use by orator."

Plaintiff's contention is, that although he has made other arrangements with a different company for light, yet it is the duty of respondent to keep on hand gas and electricity with proper meters and connections and electric burners "in case of an accident" to the company which has contracted to supply him, and that too without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract between the city and respondent, expressed or implied. There is no equality or equity in such a proposition. It is hardly necessary to cite authorities, but we refer to the following: Williams *v.* Mutual Gas Co., 50 Amer. Rep. 266; 52 Mich. 499.

There is no error in the record. *Affirmed.*[1]

STATE EX REL. GWYNN *v.* CITIZENS' TELEPHONE CO.

SUPREME COURT OF SOUTH CAROLINA, 1901.

[61 *S. C.* 83.[2]]

PETITION by J. B. Gwynn for *mandamus* against Citizens' Telephone Co., requiring it to place a telephone in his store and in his residence. From order refusing the writ, petitioner appeals.

Mr. Chief Justice McIVER. This was an application, addressed to the Circuit Court, for a writ of *mandamus*, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its

[1] *Compare:* Adams Express Co. *v.* Cincinnati Gas Co., 10 Oh. Dec. 389.

[2] This case is abridged. — ED.

other subscribers. The application was refused by the circuit judge, and the relator appealed to this court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions, as stated by counsel for respondent, in his argument here, which are presented by this appeal.

As is said by the circuit judge in his decree, "There is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on the 16th day of August, 1898, became a corporation under the laws of this State, for the purpose of owning, constructing, using, and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now and was at the time of the commencement of this proceeding engaged in the said business, having established an exchange in said city, from which connections were made to telephone instruments in offices, places of business and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone, it is placed in the office, residence, or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899, the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephone exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent, under a similar agreement, but some of respondent's subscribers, including some merchants, physicians, and others and one groceryman, whose place of business was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this State, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two

structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell Telephone — respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of their telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers; but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges: "That its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor. That even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge its switch-board." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "Case" shows, it cannot now be considered. Beside, this court, having reached the conclusion, as will presently appear, that the relator is entitled to the *mandamus* for which purpose the case will be remanded to the Circuit Court, with instructions to carry out the views herein announced, that court can, in its order directing the writ of *mandamus* to be issued, make such provision, by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

We will next proceed to consider the several questions of law, growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here, on the part of the respondent, and we propose to adopt that statement. 1st. Is the defendant telephone company, in any sense, a common carrier? 2. Can the defendant telephone company be required, in any case, against its will, to supply one of its instruments to petitioner? 3. Can the defendant telephone company be required by *mandamus*, under the circumstances of this case, to so furnish its instruments to petitioner?

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, *a quasi* common carrier of news, and as such was under an obligation to serve all alike

who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal — that the relator refused to agree that he would use respondent's telephone system exclusively — was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent, when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the *mandamus* prayed for should not issue under the circumstances of this case, to wit: that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above: that there does not appear to be any evidence in the "Case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the *mandamus* to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with the relator's demand.

As to the position taken in the argument — that *mandamus* is not the proper remedy — we think it entirely clear, both upon principle and authority, that *mandamus* is the appropriate remedy in a case of this kind.

The judgment of this court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that court, with instructions to carry out the views therein announced.[1]

SHEPARD *v.* GOLD STOCK AND TELEGRAPH CO.

Supreme Court of New York, 1885.

[38 *Hun*, 338.]

Appeal from an order vacating an injunction restraining the defendant from removing the gold and stock reporting instruments from the rooms of the plaintiff.

Dykman, J. The object of this action is to restrain the defendant from removing the gold and stock reporting instruments from the plaintiff's place of business, and a preliminary injunction was obtained which did forbid such removal. That order was vacated at Special Term, and we have an appeal from that order. The appeal is without merit. In the contract by which the plaintiff procured the possession of the instruments, the company reserved the unqualified right to discontinue the reports and remove the instruments without notice when they were used in any way which it considered detrimental to its interests. The injunction prohibited the exercise of the right thus reserved, and was for that reason properly vacated.

The order should be affirmed, with costs and disbursements.

Pratt, J. Defendants are a public corporation under obligation to render their services impartially and without discrimination to all persons who comply with their reasonable rules. Yet the contract entered into by the parties is not to be disregarded, and such reasonable stipulations as it contains will be respected and enforced by the court. The contract provides as follows: "These reports are furnished to subscribers for their private use in their own business, exclusively. It is stipulated that such will not sell or give up the copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule subscription by one party for the benefit of himself and others at their joint expense will not be received." The stipulation is reasonable and not in conflict with the duty owed by

[1] *Compare:* State *v.* Telephone Co., 23 Fed. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Talley, 118 Ind. 194; State *v.* Telephone Co., 17 Neb. 126; State *v.* Telephone Co., 36 Oh. St. 296; Telephone Co. *v.* Com., 3 Atl. 825; Telephone Co. *v.* Telephone Co., 61 Vt. 241. — Ed.

defendants to the public. The proof shows that plaintiff habitually caused the quotations, when received upon defendant's instrument, to be transmitted by private wire to Lawrence Gross & Co., at 574 Fifth Avenue.

Plaintiff seeks to justify this breach of the conditions upon which he received the instrument by alleging that he is interested in business with that firm. We think this affords no justification. If plaintiff, by entering into business relations with another firm, could gain a right to repeat the quotations he might, if diligent, absorb a great share of defendant's business. Plaintiff's attempted justification brings out clearly the reasonableness of the clause in the contract to which we have referred. The violation by plaintiff of the stipulation upon which he received the instrument amply sustains the order vacating the injunction.

Order affirmed, with costs.[1]

Present — Pratt and Dykman, JJ.; Barnard, P. J., not sitting.

Order vacating injunction affirmed, with costs.

THE INTER-OCEAN PUBLISHING CO. *v.* THE ASSOCIATED PRESS.

Supreme Court of Illinois, 1900.

[184 *Ill.* 438.]

Mr. Justice Phillips[2] delivered the opinion of the court:

The Inter-Ocean Publishing Company, a corporation organized under the laws of the State of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The Daily Inter-Ocean" and "The Weekly Inter-Ocean," which have a wide circulation in the States and Territories of the United States. The Associated Press is a corporation organized under the laws of the State of Illinois in 1892. The object of its creation was, "To buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same; to purchase, erect, lease, operate, and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares, and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering, and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news

[1] *Compare:* Grain and Stock Exchange *v.* Board of Trade, 127 Ill. 153; Telegraph Co. *v.* Hyer, 22 Fla. 637; Telegraph Co. *v.* Wilson, 108 Ind. 308; Brown *v.* Telegraph, 6 Utah, 236.

[2] The case is abridged. — Ed.

to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article 11. — Sec. 8. *Sale or purchase of specials.* — No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from, any person, firm, or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm, or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors." . . .

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing and Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing and Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complainants against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing and Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing

its newspapers, from the Sun Printing and Publishing Association ; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important, and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centred in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

We hold that the Circuit Court of Cook County erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the same. The judgment of the Appellate Court for the First District and the decree of the Circuit Court of Cook County are each reversed, and the cause is remanded to the Circuit Court of Cook County, with directions to enter a decree as prayed for in the bill. *Reversed and remanded.*[1]

[1] *Compare :* State *v.* Associated Press, 159 Mo. 410. — Ed.

PEOPLE *v.* NEW YORK CENTRAL, ETC. RAILROAD CO.

SUPREME COURT OF NEW YORK, 1883.

[28 *Hun*, 543.[1]]

DAVIS, J. . . . The petition in each case alleges that the said railroad company, since about the 16th day of June, 1882, "has substantially refused to discharge its duties as a common carrier, and has, to a material degree, suspended the exercise of its franchises by refusing to take freight which has been offered at its stations in the city of New York for transportation, at the usual rates and upon the usual terms;" and that said railroad company has refused to accept and transport the greater part of the outgoing, and to deliver the incoming freight and property of the merchants doing business in the city of New York, who have relations with and need for the services of such railway, and has refused to them to furnish adequate transportation for the same, so that from that date the business community of the city of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation; but said railroad has uniformly delayed and sometimes peremptorily refused to receive and deliver freight, and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damages accrue to the people of the State of New York, for which there is no adequate remedy in damages, and that the trade and commerce of said city is greatly injured by the action of the said railroad.

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations; but it is not important to examine them minutely, because the omission of a demurrer *ore tenus* extends to and admits the well-pleaded averments of the petition. Stated very briefly, the affidavits show that, for about two weeks, the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city; and in many instances refused to receive goods offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shipper to pay charges, but was wholly the act of respondents; that it was so continuous and extensive that it seriously interfered with the

[1] This case is abridged. — ED.

business operations of the citizens of New York, deteriorated the value of many commodities, and caused a diversion of trade from the city; that great losses were caused, and especially that large quantities of perishable goods, by reason of non-delivery, were destroyed, to the value of many thousand dollars; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than $50,000, while the aggregate of injuries is estimated at some millions. These are the substantial facts conceded by the respondents at the Special Term. Surely, it cannot be doubted that these facts, being true and unexcused, showed a strong case for the interference of the State.

The only question is, whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the court was justified in denying the motion for the writ on its merits, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons assigned by the respondents for their refusal to accept, transport, and deliver the freight and property. In the petition it is stated in these words, "that the persons in their employ handling such freight refuse to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour, or two dollars per day of ten hours, were paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterwards employed, caused the neglect and refusal complained of.

It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appear. It is urged in effect that the court should regard the case as one of unlawful duress, caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statements of the case, a body of laborers, acting in concert, fixed a price for their labor, and refused to work at a less price. The respondents fixed a price for the same labor, and refused to pay more. In doing this neither did an act violative of any law, or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid, and adhere to it, if they chose; but if the consequence of doing so were an inability to exercise their corporate franchises to the great injury of the public, they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. Whether such a state of facts could have been shown or not we cannot judicially know. The present case must stand or fall upon the papers before us; and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for *mandamus*.

These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to *mandamus* or indictment.

We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of *mandamus* in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf and not for some private suitor, or to re-

dress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions, whether what has been done is a sufficient compliance with its command, may properly arise and become a subject of further consideration. People *ex rel.* Green *v.* D. and C. R. R. Co., 58 N. Y. 152, 160, 161. They need not have been anticipated. It is suggested that the time has now passed when such a writ can be of any valuable effect. This is probably so, but we are governed by the record in disposing of the appeal and not by subsequently occurring events.

The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous they are entitled to have that judgment reversed, and to be indemnified, in the discretion of the court, for the costs incurred on the appeal made necessary by the error.

We think the court below had power to award the writ, and that upon the case presented it was error to refuse it.

The order should be reversed, with the usual costs, and an order entered, if deemed advisable from any existing circumstances by the attorney-general, awarding the writ.

Daniels and Brady, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements in each case.[1]

TOLEDO, A. A. AND N. M. RY. CO. *v.* PENNSYLVANIA CO.

Circuit Court of the United States, 1893.

[54 *Fed. Rep.* 746.[2]]

In equity. Bill by the Toledo, Ann Arbor and North Michigan Railway Company against Albert G. Blair, Jacob S. Morris, the Pennsylvania Company, the Lake Shore and Michigan Southern Railway Company, and others, to enjoin respondents from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. The injunction was issued, served upon the Lake Shore and Michigan Southern Railway Company, and brought to the notice of its employees by publication. Heard on application by said company for an order attaching Clark, Case, Rutger, and Lennon, its employees, for contempt in violating the injunction. Granted as to Lennon.

Ricks, District Judge. . . . This order was served upon the several defendants, and the Lake Shore and Michigan Southern Railroad, through its general superintendent, Mr. Canniff, made publication of the

[1] *Compare:* Lake Shore, &c. R. R. *v.* Bennett, 89 Ind. 457; Indianapolis, &c. R. R. *v.* Juntgen, 10 Ill. App. 295; Geismer *v.* Lake Shore &c. R. R., 102 N. Y. 563; Hall *v.* Pennsylvania R. R., 14 Phila. 414. — Ed.

[2] This case is abridged. — Ed.

order in such way as to bring it to the attention of its employees, and particularly to those of its engineers driving engines on the Detroit division, where the interchange of cars with the Ann Arbor road was frequent. On the 18th of March an affidavit made by the superintendent of the Michigan division of the Lake Shore and Michigan Southern Railroad was filed, alleging that certain of its employees, while in the service of said company, and with full notice and knowledge of the injunction theretofore made, had refused to obey the orders of the court, and upon that affidavit an application was made by said company for an attachment to issue against the employees so named, "as being in contempt of the restraining order of the court." The court declined to make the order in the form applied for, but directed one to be entered requiring the engineers and firemen named to appear in court forthwith, and show cause why they should not be attached for contempt. This is the usual and well-established practice in this district, as numerous precedents in the last ten years will show.

Before proceeding to pass upon the evidence as to whether the men now before the court under charges for contempt are guilty or not, it may be profitable to consider the general principles of law applicable to the duties with which the accused were charged by the orders issued to them and to their employers. They were in the employ of the defendant the Lake Shore and Michigan Southern Railroad at the time the orders in this case were made, compelling it to receive from the Ann Arbor road all interstate freight it might tender. The testimony shows that the terms of this order were made known to the employees generally, and that they were thoroughly advised of its scope and mandatory provisions. That their employer was obligated, both under the general provisions of the interstate commerce law and under this order of the court, to receive and haul all interstate freight, must have been known to them. They must also be held to have known that the penalties of the law were severe in case their employer violated either the law or the order of the court. Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employees upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe

penalties. In ordinary conditions as between employer and employee, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employee has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperilled, and the safety of the property jeopardized ? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore and Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependent. They transport the products of factories whose output must be speedily carried away to keep their employees in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the travelling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employees, the courts have the power to grant partial relief, at least by restraining employees from committing acts of violence or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such

cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergencies, as far as possible, within the limits of existing laws, until needed additional legislation can be secured.[1]

Granted as to Lennon.

SAVANNAH AND OGEECHEE CANAL CO. *v.* SHUMAN.

SUPREME COURT OF GEORGIA, 1893.

[91 *Ga.* 400.]

LUMPKIN, J. 1. The 16th section of the charter of the Savannah, Ogeechee and Altamaha Canal Company, Dawson's Compilation, p. 97, declares, "that the said corporation shall be obliged to keep the said canals and locks in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, and other water crafts; and for the transportation of goods, merchandise, and produce," etc. Counsel on both sides referred us to the above charter as that of the plaintiff in error, which is designated in the record as the "Savannah and Ogeechee Canal Co.," and is also thus designated in the case of Habersham *et al.* against this corporation in 26 Ga. 665. We therefore presume, without investigation, that the corporate name of this company was at some time properly amended by striking out "Altamaha" and placing "and" before "Ogeechee." It is apparent, without argument, that under this charter it is the imperative duty of this company to keep its canal in a navigable condition, and according to the principle of the ruling of this court in the case above cited, the performance of this duty may be enforced by *mandamus*.

2. It appears from the record that the defendant in error is engaged in the lumber business, and for several years had used the canal in question for transporting timber and other things, and that because of its unnavigable condition he was compelled to ship his timber by a more circuitous and expensive route. It is clear, therefore, that he is specially interested in the navigation for which this canal was chartered, and that by the failure of the company to keep the canal navigable he sustains a special damage in which the general public does not share. Under these circumstances he was, in our opinion, entitled to the writ of *mandamus* to compel a performance by the company of the duty above mentioned. There may be authorities to the contrary,

[1] *Compare:* Trust Co. *v.* No. Pacific R. R., 60 Fed. 803; U. S. *v.* Elliot, 62 Fed. 801; *Re* Phelan, 62 Fed. 803; Arthur *v.* Oakes, 63 Fed. 310; *In re* Debs, 158 U. S. 564.—ED.

but the true law of this question seems to be in favor of the doctrine that a private person may, by *mandamus*, enforce the performance by a corporation of a public duty as to matters in which he has a special interest. See 2 Morawetz on Priv. Corp. § 1132; 4 Am. & Eng. Enc. of Law, 289, 291, and cases cited. In the case reported in 26th Ga., *supra*, the relief sought was granted at the instance of private persons, but it does not appear that the point was specially made as to their right, as such, to apply for the writ of *mandamus*, the position then taken by the canal company being that this writ would not lie at all.

3. In Moody *v.* Fleming, 4 Ga. 115, this court held that, except in a case of clear legal right, the writ of *mandamus* was a discretionary remedy. This view was followed in Harwell & Wife *v.* Armstrong *et al.*, 11 Ga. 328, and in Loyless *v.* Howell, 15 Ga. 554, injunction cases, in which this court, by citing the case first above mentioned, evidently intended to put cases of *mandamus* and of injunction upon the same footing as to the question of discretion. The granting, or refusing, of injunctions has always been regarded as discretionary, and it seems quite clear that in cases of *mandamus*, it lies very largely within the discretion of the presiding judge as to whether or not the writ will, in a given case, be made absolute; and in order to reverse a judgment in a case of this kind, it would be necessary to show that the discretion of the court was abused.

In the present case, the corporation answered that it had no funds, nor any means of obtaining such; and also, that it would not be profitable to operate the canal if it were put in navigable condition. For the purposes of the decision below this answer was taken as true, the question of its sufficiency being raised by demurrer.

So long as the corporation retains its franchise, it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter, that the same would be unprofitable. It cannot consistently keep the franchise and refuse to perform the duties incident thereto for the mere reason that such performance would be unremunerative. If the rights, privileges, and franchises granted by the charter are, in connection with the corresponding duties thereby imposed, no longer desirable, the company should simply surrender the charter.

As to the validity of the other reason alleged for failing to put the canal in a navigable condition, viz.: that the company is without funds, and without means of obtaining funds, the question is by no means so clear. The writer was inclined to hold that, under section 3200 of the code (providing that *mandamus* will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless), the answer of the company presented a good reason for refusing in this case to make the writ absolute. After some reflection, however, I have yielded to the better judgment of my brethren, and concluded to agree with them in holding that the entire matter may be safely left to the discretion of the circuit judge. While it is quite certain that if the company

has no funds now, nor any means of obtaining them, and remains permanently in this condition, compliance with the judge's final order will be impossible, so far as the corporation itself is concerned, there may be a change in the present condition of things, and the officers of the company may be able to find some way to raise money in order to obey the mandate of the court. At any rate, they should make a *bona fide* effort to do so. If, because of the want of means, they cannot comply with the writ, and if, after due diligence, they remain unable to procure the necessary means for this purpose, and make these things appear to the court in any proceeding for contempt which may be instituted against them, we apprehend the presiding judge would take great care to see that no injustice or hardship was imposed upon them, and certainly would not inflict punishment for a failure to do a thing impossible of accomplishment. This matter is not now directly before us, and we leave the question thus raised to be dealt with by the judge of the court below when it arises, if it ever does. *Judgment affirmed.*[1]

STATE EX REL. LITTLE *v.* DODGE CITY, MONTEZUMA AND TRINIDAD RAILWAY CO.

SUPREME COURT OF KANSAS, 1894.

[53 *Kan.* 329.]

HORTON, C. J. This proceeding has been commenced in this court, not for the purpose of compelling the Dodge City, Montezuma and Trinidad Railway Company or any of the defendants to operate the line of that railway in Ford and Gray Counties, or any part thereof, but merely to require the defendants to repair and relay certain portions of the track and roadbed of the railway company. A railway company may be compelled by *mandamus* to perform the public duties specifically and plainly imposed upon the corporation; and, therefore, we have no doubt of the power of this court, in a proper case, to compel a company to operate its road, and for that purpose to compel the replacement of its track torn up in violation of its charter. The State *v.* Railway Co., 33 Kans. 176; City of Potwin Place *v.* Topeka Ry. Co., 51 Kan. 609; U. P. Ry. Co. *v.* Hall, 91 U. S. 343; Rex *v.* S. & W. Ry. Co., 2 Barn. & Ald. 646. But the granting of a writ of *mandamus* rests somewhat in the discretion of the court. City of Potwin Place *v.* Topeka Ry. Co., *supra.*

The Montezuma railway company is insolvent. It has no cars or

[1] *Compare: In re* R. R., 17 N. B. 667; R. *v.* S. W. R. R., 2 B. & A. 646; Pacific R. R. *v.* Hall, 91 U. S. 343. — ED.

engines. Its line of road has not been operated for many months. The road cannot be operated except at a great loss. The railway company is not able to operate it, and has no funds or property which can be applied to the payment of operating expenses. A. T. Soule, the promoter of the railway company, has expended over $200,000 in the construction and operation of the road without any returns. All of its property was sold, or attempted to be sold, to the Block-Pollak company for $25,000 only. The venture of the promoter has been very unsuccessful to him. His experience, and the other parties investing, in constructing and operating this railway has been most unfortunate. No one connected with the railway corporation has realized any personal benefit from any bond, mortgage, or subsidy of the road. The Rock Island road, which, by an arrangement with the Montezuma company, ran its trains over the road from the time of its completion until May, 1893, and which has better facilities for operating the road than any other company or person, will not take the road as a gift and operate it. It seems to be conclusively shown that all the receipts to be derived from operating the road will not pay the operating expenses, not taking into account the repairs of the road and the taxes.

The contention on the part of the plaintiff is, that as the railway was sold to E. F. Kellogg for Wilson Soule by a receiver, and not by the sheriff of Ford County, the sale is absolutely void. If this be true, then there is no legal duty upon the part of Wilson Soule to repair or operate the road. If, however, the sale is not absolutely void, we do not think, upon the showing made, that Wilson Soule, as a private person, ought to be compelled to operate the road. The Block-Pollak Iron Company cannot, under its conditional purchase of the superstructure, be compelled to repair or operate the road. There is no legal duty upon any of the other defendants to repair the road. Therefore, the question is, whether the court will compel, or attempt to compel, the railway company, a bankrupt corporation, to relay the track and repair the roadbed. The court will not make a useless or futile order. It will not do a vain thing. The order prayed for should only be issued in the interest of the public. If the track is replaced, there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has little interest in the operation of the road or in its being kept in repair. Mor. Priv. Cor. 1119; Commonwealth *v.* Fitchburg Ry. Co., 12 Gray, 180; O. & M. Ry. Co. *v.* People, 30 Am. & Eng. Ry. Cases [Ill.], 509; People *v.* A. & Vt. Ry. Co., 24 N. Y. 261.

The average life of cedar ties — the kind used on this road — is from three to five years. All the ties laid in 1888 will soon be so much decayed as to be worthless. A large part were worthless when the track was taken up. If the track were relaid, the road would be in no reasonable condition to be used, unless new ties were furnished, and these in a few years would again become decayed and useless. The use of the road was abandoned before any part of the track was torn

up. If the track were replaced, it would be of no immediate public benefit — possibly of no future benefit — because, if the railway is not operated, the mere existence of a road, not in use, is not beneficial to any one.

The peremptory writ prayed for will be denied, with costs.

All the justices concurring.[1]

STATE EX REL. WOOD *v.* CONSUMERS GAS TRUST CO.

SUPREME COURT OF INDIANA, 1901.

[157 *Ind.* 345.[2]]

MANDAMUS by the State, on relation of Ann E. Wood, against the Consumers Gas Trust Company to compel defendant to permit relatrix to use natural gas from its main. From a judgment for defendant, plaintiff appeals. *Reversed.*

HADLEY, J. . . . The things requested and commanded of the appellee were to lay a service-pipe from its main in Bellefontaine Street to the property line in front of the relatrix's house, and to permit her to use the gas. The mandate is not to furnish the relatrix with an adequate or any definite amount of gas, but the obvious force and limitations of the request, and order, are to require the appellee to furnish her with the necessary means, and permit her to use the gas upon the same terms that other inhabitants of the city are permitted to use it. Is it the legal duty of appellee to do these things? *Mandamus* is a proper remedy to compel appellee to furnish gas to the relatrix if it is shown that she is entitled to it. Portland, &c. Co. *v.* State *ex rel.*, 135 Ind. 54, 21 L. R. A. 639.

The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit received by the citizens is the adequate consideration for the right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all

[1] *Compare: In re* Bristol, &c. R. R., 3 Q. B. D. 10; City *v.* Topeka R. R., 33 Kans. 176; C. *v.* Fitchburg R. R., 12 Gray, 180; P. *v.* Vt. R. R., 24 N. Y. 261. — ED.

[2] This case is abridged. — ED.

members of the public contributing to its asserted right, impartially, and to permit all such to use gas who have made the necessary arrangements to receive it, and apply therefor, and who pay, or offer to pay, the price, and abide the reasonable rules and regulations of the company. Portland, &c. Co. *v.* State *ex rel.*, 135 Ind. 54; Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 36 L. R. A. 535; Haugen *v.* Albina, &c. Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; People *v.* Manhattan Gas Co., 45 Barb. 136; Crumley *v.* Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058; American, &c. Co. *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; State *ex rel. v.* Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574.

But, without controverting the law as declared in the foregoing cases, or claiming exemption from the rule, it is answered as a justification for denying the relatrix the use of gas, that the corporation was organized as a voluntary enterprise in the general interest of the people of Indianapolis; that its purpose was not the making of money for any one, but to furnish gas to consumers in the city at the lowest possible rate, and that the supply of gas the corporation has on hand, or that it may possibly procure, is insufficient to supply what customers it has now connected with its mains, in severely cold weather, and that to permit the relatrix to use gas would be to further reduce the already insufficient supply. Will these facts relieve the appellee of its duty to permit the relatrix to use its gas? If they will, then it must be true that the relatrix is not entitled to share in the gas furnished by appellee to the inhabitants of the city, because her participation will reduce the possible supply below the full requirements of those already being served.

It is proper to observe that the present consumers of appellee's gas are not here complaining of the quantity of gas received by them, or protesting against the admission of the relatrix to a share of the supply, and it is difficult to see how the appellee, while continuing to assert and exercise its extraordinary rights, may set up its own default or probable default to others as a legal excuse for the non-performance of its duty to the relatrix.

The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine Street in front of her house has been dug up and her property made servient to the use of appellee in laying its pipes, and in carrying forward its business, and her right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee has laid its pipes, or it is held of right by none. The legislature alone can authorize the doing of the things

done by appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Cooley's Con. Lim. (6th ed.), 651, and cases cited.

Appellee's contract is with the State, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority, or superiority, of right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So if appellee has found it impossible to procure enough gas fully to supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed to us no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, "and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." 45 Cent. L. J. 278; Haugen *v.* Albina, &c. Co., 21 Ore. 411; Olmsted *v.* Proprietors, &c., 47 N. J. L. 311; Stern *v.* Wilkesbarre Gas Co., 2 Kulp. 499; Chicago, &c. Co. *v.* People, 56 Ill. 365; 8 Am. Rep. 690; Nebraska Tel. Co. *v.* State, 55 Neb. 627, 634; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. 841; State *ex rel. v.* Delaware, &c. R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

In a further material sense the discrimination asserted by the answer becomes injurious to the relatrix. It is a matter of common knowledge that natural gas is a cheap and convenient fuel, and for many reasons is eagerly sought by those who may reasonably obtain it. It is therefore, of like knowledge, that in a community where it is supplied to some premises, and denied to others, the effect is to enhance the value of such parcels as have it, by making it more desirable and profitable to occupy them, and to depreciate the value of such parcels as are excluded from its use. It is very clear that appellee may not, under the guise of administering a public benefit, exercise a public power, to take the property of one and confer it upon another.

The principal argument of appellee's counsel is, that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and *mandamus* will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that *mandamus* will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable, and nothing impossible of performance. The whole question comes to this. The appellee under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix owning a lot abutting on one of the appellee's lines erected thereon a dwelling-house, and upon the faith of being permitted to use the gas has piped her house, and constructed her heating apparatus of a form, suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has in common with other abutters been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in denying her the rights accorded to those of her neighbors who have contributed in the same way to appellee's enterprise. The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.

ALLNUTT *v.* INGLIS.

King's Bench, 1810.

[12 *East*, 527.[1]]

Lord Ellenborough, C. J. The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. The question then is, whether circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way; where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either "because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out: in that case (he says) there cannot be taken arbitrary and excessive duties for cranage, wharfage, &c.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter." And then he assigns this reason. "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only." Then were the company's warehouses *juris privati* only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause (43 Geo. 3, c. 132, the general warehousing act) says that it would greatly tend to the encouragement of the trade and commerce of G. B., and to the accommodation of mer-

[1] This case is abridged. — Ed.

chants and others, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry: and then it says that it shall be lawful for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses: and then by sect. 2 other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction; and it is enough that there exists in the place and for the commodity in question a *virtual monopoly* of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.

MUNN *v.* ILLINOIS.

SUPREME COURT OF THE UNITED STATES, 1876.

[94 *U. S.* 113.[1]]

ON the twenty-ninth day of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city

[1] This case is abridged.—ED.

of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed.

From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: *first*, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, *second*, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error:—

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. Chief Justice WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of Government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as

they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagon-

ers, carmen, and draymen, and the rates of commission of auctioneers," 9 Stat. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the

largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such bnsiness as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll."

Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should

not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of the property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its

jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other. *Judgment affirmed.*[1]

Mr. Justice FIELD and Mr. Justice STRONG dissented.

PEOPLE *v.* BUDD.

COURT OF APPEALS, NEW YORK, 1889.

[117 *N. Y.* 1.[2]]

APPEAL from judgment of the general term of the Superior Court of the city of Buffalo entered upon an order made December 31, 1888, which affirmed a judgment of a criminal term of said court entered upon a verdict, convicting defendant of a misdemeanor in violating the provisions of the act (chap. 581, Laws of 1888) known as the Elevator Act.

The material facts are stated in the opinion.

Decided October 15, 1889.

ANDREWS, J. The main question upon this record is whether the legislation fixing the maximum charge for elevating grain, contained in the act (chapter 581, Laws 1888), is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State at five-eighths of one cent a bushel, and for trimming and shovelling to the leg of the elevator, in the process of handling grain by means of elevators, "lake vessels, or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than 130,000 population. The defendant, the

[1] *Compare:* Davis *v.* State, 68 Ala. 58; Breechbill *v.* Randall, 102 Ind. 528; Nash *v.* Paige, 80 Ky. 539; Dock Co. *v.* Garrity, 115 Ill. 155; State *v.* Edwards, 86 Me. 105; R. R. *v.* Stock Yard Co., 45 N. J. Eq. 50; Ryan *v.* Terminal Co., 102 Tenn 119; Barrington *v.* Dock Co., 15 Wash. 175. — ED.

[2] This case is abridged. — ED.

manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company, for elevating, raising, and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator the carrier was charged and compelled to pay $4 for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed, pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator $1.75 a thousand bushels for the use of the steam-shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services, and the expense of the steam-shovel, charge the carrier for each thousand bushels of grain shoveled the sum of $4. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count, charging a violation of the first section in two particulars, viz., in exacting more than the statute rate for elevating the cargo, and exacting more than the actual cost for shoveling the grain to the leg of the elevator. . . .

The question is whether the power of the legislature to regulate charges for the use of property, and the rendition of services connected with it, depend in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business. Lord HALE, in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn Case, used the language that when private property is "affected with a public interest it ceases to be *juris privati* only," in assigning the reason why ferries and public wharves should be under public regulation, and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing places on both sides of the stream, without a charter from the king, or a prescription time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business in which the whole community were interested could be regulated. In other words, it was simply one mode of exercising a prerogative of government — that is to say, through the sovereign instead of through Parliament — in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord KENYON in Rorke *v.* Dayrell, 4 Term R. 410, said: "The prerogatives [of the crown] are not given for the

personal advantage of the king, but they are allowed to exist because they are beneficial to the subject;" and it is said in Chitty on Prerogatives (page 4): "The splendor, rights, and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject." And Lord HALE, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord HALE says, could not be taken without lawful title by charter or prescription. De Port. Mar. 77. But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls, nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord HALE is explicit upon both these points: "If the king or subject have a public wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the statute of 1 Eliz. c. 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, passage, etc. Neither can they be enhanced to an immoderate degree, but the duties must be reasonable and moderate, though settled by the king's license or charter."

The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken without the king's license does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he by express license authorize the taking of more. The language of Lord HALE, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign. The control which by common law and by statute is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and, even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point

of reasonable compensation. From time to time statutes have been enacted in England and in this country fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers until recent times was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The state conferred no franchise, and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers, and the subjection of the business to public regulation, were based on the character of the business; or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment." Jones, Bailm. App. It is only a public employment in the sense of the language of Lord HALE, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law, that common carriers must serve the public for a reasonable compensation, became a part of the law of this state, and from the adoption of the constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case, which was cited with approval on this point in Sawyer *v.* Davis, 136 Mass. 239. It accords with the language of Chief Justice SHAW in Com. *v.* Alger, 7 Cush. 53: "Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is received by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may nevertheless interfere, and prescribe or limit the charges of railroad corporations. The Granger Cases, 94 U. S. 113; Dow *v.* Beidelman, 125 U. S. 680; EARL, J., in People *v.* Railroad Co., 70 N. Y. 569; RUGER, C. J., in Railroad Co. *v.* Railroad Co., 111 N. Y. 132.

The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state, in constituting a corporation, may prescribe or limit its powers, and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchise are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection have been bestowed. It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct, and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society, and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which by legislation would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by the most imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty, — liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie Canal and Hudson River to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, the cargo of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie Canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a water-way between Lake Erie and the Atlantic Ocean, sets forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures, and commerce, mitigate the calamities of war, and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the state has expended vast sums of money, raised by taxation; and finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it, more perhaps than to any other single cause, is it owing that the city of New York has become the commercial centre of the Union.

Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life,

or force the trade in grain into channels outside of our state. In Hooker *v.* Vandewater, 4 Denio, 349, the court was called upon to consider the validity of an agreement between certain transportation lines on the canal to keep up the price of freights. The court held the agreement to be illegal, and JEWETT, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys, or even relaxes, competition in trade is injurious, if not fatal, to it." The same question came up a second time in Stanton *v.* Allen, 5 Denio, 434, and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are, at the same time, a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chit. Prerog. 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the constitution," and many governmental powers vested in the sovereign in England have since our Revolution devolved on the legislatures of the states. The statutes of England in earlier time were full of oppressive commercial regulations, now, happily, to a great extent abrogated; but that the interests of commerce are matters of public concern all states and governments have fully recognized.

The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges, and to bring into the combination any new elevator which may be erected, and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal-boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said CHASE, C. J., in the License Tax Cases, 5 Wall. 469, "can know nothing of public policy, except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord HALE, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen, and the interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries because the right to establish a ferry is a franchise, and therefore the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the beds of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferrymen were made subject to public regulation is that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the beds of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between wharves built upon the beds of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the beds of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord HALE on the ground of a virtual, as distinguished from a legal, monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit con-

ferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is that the prohibition, as well as the regulation, of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances collectively create an exceptional case, and justify legislative regulation.

The case of Munn *v.* Illinois has been frequently cited with approval by courts in other states. Nash *v.* Page, 80 Ky. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Telegraph Co., 66 Md. 399; Davis *v.* State, 68 Ala. 58. In Nash *v.* Page it was held, upon the doctrine of the Munn Case, that warehousemen, for the public sale and purchase of tobacco in Louisville, exercised a public business, and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hockett *v.* State it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were, in legal contemplation, devoted to public use. In Telegraph Co. *v.* Telephone Co. legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn Case. The criticism to which the Munn Case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the King Case, 110 N. Y. 418, it was given a much broader scope, and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public enter-

tainment. In that case the owner of the skating-rink derived no special privilege or protection from the state. The public held no right, in any legal sense, to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment he subjected it to public regulations. There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty, and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power, and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course. So, also, in that wide range of legislative powers over persons and property which lie outside of the prohibitions of the Constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life-blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy if, at the bottom, the legislation under it is oppressive and unjust. The remedy by taking away the power of the legislature to act at will would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of

government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as any reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature. The judgment should be affirmed.[1]

BRASS *v.* NORTH DAKOTA EX REL. STOESER.

SUPREME COURT OF THE UNITED STATES, 1894.

[153 *U. S.* 391.[2]]

NORMAN BRASS, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the State of North Dakota. The defendant in error, Louis W. Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat-crop for the compensation fixed by section eleven of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal Stoeser filed in the District Court of Ramsey County, North Dakota, a petition for an alternative writ of *mandamus*. The District Court granted an alternative writ of *mandamus* (as follows). . . .

Mr. Justice SHIRAS . . . The legislature of the State of North Dakota, by an act approved March 7, 1891, c. 126, Laws of 1891, p. 321, and entitled "An Act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the fourth section thereof, that "all buildings, elevators, or warehouses in this State, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this State, as above

[1] *Compare:* Railroad Co *v.* Stockyard Co., 45 N. J. Eq. 50; Belcher *v.* Grain Elevator, 101 Mo. 192; McCullough *v.* Brown, 41 S. C. 247; Steamship Co. *v.* Elevator Co., 75 Minn. 312. — ED.

[2] This case is abridged. — ED.

described, whether said owners or operators reside within this State or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the fifth section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this State shall file with the railroad commissioners of the State a bond to the State of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than $5,000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the State in relation thereto;" and in the eleventh section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner;" and by the twelfth section it is provided that "any person, firm, or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the District Court of the Second Judicial District of the State of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the Supreme Court of the State. Brass *v.* North Dakota, 52 N. W. Rep. 408.

In the cases thus brought to this court from the States of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those States, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States, and to the Fourteenth Amendment, which ordains that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed,

their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire State.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire State, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in trans-shipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural

State, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length, into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of *mandamus*, based his defence wholly upon grounds arising under the Constitution of the State and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the States. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly *Affirmed.*

Mr. Justice Brewer, with whom concurred Mr. Justice Field, Mr. Justice Jackson, and Mr. Justice White, dissenting.[1]

LOWRY *v.* TILE, MANTEL AND GRATE ASSOCIATION.

Circuit Court of the United States, 1899.

[98 *Fed.* 817.[2]]

Morrow, Circuit Judge. This is an action at law brought to recover damages alleged to have been sustained by plaintiffs by reason of injury to their business caused by the forming of an association by defendants claimed to be within the prohibitory provisions of the act of Congress of July 2, 1890, commonly known as the "Sherman Anti-trust Act." The amended complaint alleges: That in the years 1896 and 1897 there were in San Francisco and the other said cities numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying of them. That defendants, with intent to form a contract, trust, and conspiracy in restraint of trade and commerce between the State of California and the States of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, for the purpose of controlling the output and regulating the price of these com-

[1] *Compare:* Cotting *v.* Goddard, 22 Sc. Rep. 30; Stock Co. *v.* Exchange, 143 Ill. 239; Ladd *v.* Cotton Press, 53 Tex. 172. — Ed.

[2] This case is abridged. — Ed.

modities and monopolizing the said trade, combined and conspired to monopolize the grate, tile, and mantel importations and trade and commerce from other States to and with the State of California, to the extent of the tiles, grates, and mantels that could be used in the State of California in the erection and construction of dwellings and buildings, and so conspired to raise the price of these commodities in the California market, and for this purpose on or about the day of January, 1898, formed an organization and adopted a constitution and by-laws, which constitution and by-laws are now in effect. That the said constitution and by-laws provided that no sales and deliveries, or contracts for the sale or delivery, or the placing of tiles, grates, or mantels, will be made by the manufacturers thereof to any person dealing in these commodities, unless such person belong to the said unincorporated association, and shall pay or cause to be paid dollars to that organization, and bind themselves to abide by its constitution and by-laws; that is to say, that no one who is a member of that organization shall sell to, or deal with or deliver to, any person engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento, and San José, and other cities in this State, unless such person shall become a member of the said unincorporated organization, and shall agree that in their general business of selling such commodities to the general public they shall sell them at such prices as may be arbitrarily fixed by the said unincorporated association. That, prior to the formation of that organization, plaintiffs were doing a large business in selling tiles, mantels, and grates, and were making an annual profit of about $5,000. That, about the time of the formation of said association, plaintiffs had placed with defendants certain orders for tiles; but these orders were not filled, but were cancelled, by the parties with whom they had been placed, for the reason that plaintiffs did not belong to, and would not join, said organization. That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which cancelled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel and Grate Association. That said organization is within the statute of the 51st Congress, passed and approved July 2, 1890, known as "Chapter 647, Supplement to the Revised Statutes at Large of the United States." That, by reason of the monopoly of such association, plaintiffs are damaged in the sum of $10,000. Plaintiffs pray for treble the sum of $10,000, in accordance with the provisions of the above-named act, and for further equitable relief. The ground of demurrer was that the amended complaint did not state facts sufficient to constitute a cause of action.

The case of U. S. *v.* Jellico Mountain Coal & Coke Co. (C. C.), 46 Fed. 432, 12 L. R. A. 753, is in point. The action was brought under the antitrust act against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to

time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined two cents per bushel and $10 for the first offence, and four cents per bushel and $20 for the second offence. Owners or operators of mines were not to sell or ship coal to any persons, firms, or corporations in Nashville who were not members of the exchange, and dealers were not to buy coal from any one but a member of the exchange. The court, commenting upon the agreement of this association of coal dealers, said:

"This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely; and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market to a large extent, at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intention of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute; and there is no need of authorities to sustain such view of the case."

In the case of U. S. *v.* Coal Dealers' Ass'n (C. C.), 85 Fed. 252, the bill alleged that defendants comprised all the wholesale dealers handling coal in San Francisco, and they, together with certain retail dealers, had conspired with intent to monopolize the coal trade and commerce between British Columbia, Washington, and Oregon, to the extent of the coal used for domestic purposes in the city of San Francisco. It was said by this court in that case:

"But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals, by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what it may be doing at any particular time."

In U. S. *v.* Addyston Pipe & Steel Co., 54 U. S. App. 723, 29 C. C. A. 141, and 85 Fed. 279, the United States began proceedings in equity against six corporations engaged in the manufacture of cast-iron pipe in localities in Ohio, Kentucky, Alabama, and Tennessee. The bill of complaint charged the defendants with a combination and conspiracy in unlawful restraint of interstate commerce. It appeared that the defendants, who were manufacturers and vendors of cast-iron pipe, entered into a combination to raise the price of pipe for all the States

west and south of New York, Pennsylvania, and Virginia, comprising some thirty-six States in all; and, to carry out this combination, the associated defendants entered into an agreement which provided certain methods of procedure in dealing with the public, whereby competition between themselves was avoided in the territory mentioned. The court, in an able opinion reviewing the whole subject of the law relating to combinations and contracts in restraint of trade, arrived at the conclusion that the association of the defendants was a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood under the act of July 2, 1890. The doctrine of that case is applicable here. The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other States, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman Act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained.[1]

TRANSPORTATION CO. *v.* STANDARD OIL CO.

COURT OF APPEALS, WEST VIRGINIA, 1901.

[40 *S. E. Rep.* 591.[2]]

BRANNON, J. The West Virginia Transportation Company brought trespass on the case in Wood County against the Standard Oil Company and the Eureka Pipe Line Company, all corporations, and upon demurrer to the declaration judgment was rendered for the defendants. The first count of the declaration charges that the plaintiff was engaged in the business of transporting petroleum oils by means of pipe lines and tank cars from Volcano and vicinity to Parkersburg, and in storing oil, and had expended $300,000 in acquiring land, rights of way, lines of tubing, and other things necessary in its business, and had built up a large and lucrative business, and that the defendants maliciously and wickedly contriving and intending to injure the plaintiff and ruin its business, and render its plant and property worthless, and deprive it of all its

[1] *Compare:* Addyston Pipe Co. *v.* U. S., 175 U. S., 211; U. S. *v.* Fuel Co., 105 Fed. 93; Mill Co. *v.* Hayes, 76 Cal. 387; Houston *v.* Beullinger, 91 Ky. 333; People *v.* Distilling Co., 156 Ill. 1; S. *v.* Fireman's Ass'n, 152 Mo. 44; People *v.* Sheldon, 139 N. Y. 251; Morris Run Co. *v.* Barclay Co., 68 Pa. St. 173; S. *v.* Oil Co., 49 Oh. St. 137; S. *v.* Distilling Co., 29 Neb. 700. — ED.

[2] This case is abridged. — ED.

business, did confederate and conspire together and with the West Virginia Oil Company, another corporation, and with C. H. Shattuck and other persons unknown to the plaintiff, to prevent all persons producing, refining, selling, or transporting oils, and particularly to prevent the plaintiff from transporting oils through its pipe lines and by means of its tank cars, and from storing oil in its storage tanks, and from executing any lawful trade in connection therewith. And it charged also that the Standard Oil Company of New Jersey organized about 1891, and was the successor of all corporations and firms prior to that date associated together under a contract known as the Standard Oil Trust; that the Camden Consolidated Oil Company was a member of the said trust, and under its control; that in 1892 the business and property of said trust were reorganized under, and are now controlled by, the Standard Oil Company, and controlled by the same men formerly owning and controlling said Standard Oil Trust; that the Eureka Pipe Line Company is owned, controlled, and operated by the same men, and doing business in the interest of the Standard Oil Company, and is a transportation branch of that company; that the West Virginia Oil Company was organized about 1885 to purchase and operate what was known as the property of the West Virginia Oil and Land Company, a territory on which the plaintiff had laid pipe lines, and from which it had for several years transported oil for compensation; that the Standard Oil Trust, through individuals interested in it, had become a large stockholder in the West Virginia Oil Company, and dictated its management; and by means thereof, and of its monopoly of the production, refining, and transportation of oil throughout the world, practically controlled the business of said West Virginia Oil Company, and since the reorganization of the Standard Oil Trust by the organization of the Standard Oil Company had continued to do so, and had induced the construction of the Eureka Pipe Line Company, and thus ruined the business of the plaintiff; that this was the object and accomplishment of the said combination and malicious conspiracy.

What wrongful acts does this first count state? The formation of trade combination — call it "monopoly" — is not actionable alone. How far the grant of exclusive privilege by the State (and this is the only monopoly, legally speaking) is valid when its right is contested, is one thing. We are not dealing with that. This monopoly is not that. It is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law. The lion has stretched out its paws and grabbed in prey more than others, but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords the right, it is given him by the Maker for existence. The State made the Standard Oil Company, and gave it this right of being and working. Better for its competitors were it not so. What other acts besides the formation of this engrossing association does the

first count charge? That it caused the West Virginia Oil Company to build a pipe line from its property to the Baltimore & Ohio Railroad to ship its oil to the refinery of the Standard Oil Company. Stockholders in the one were also in the other. Had they not the right to build this line to further their own interests, to convey product of the one for refinement by another? A man owning a farm, and also interested in a mill, may not the mill owners induce the farmer to build some means of transporting his wheat to that mill, without being liable to suit by a man owning a railroad which had been accustomed to carry wheat from that farm? And suppose there were no common interest in the farm and mill, cannot the mill owners induce this farmer to build a means of transport from his farm to their mill? Is this soliciting trade by any usual means, a legal wrong to competitors? The gravest item under this head is the charge that the Standard Company required oil producers (without specifying any but the West Virginia Oil Company), as a condition precedent to purchasing their oil, to ship through said pipe line, and required those producers in the land of the West Virginia Oil Company to do so as a condition precedent to holding their leases, notwithstanding that the more usual and satisfactory route of transport was the pipe line of the plaintiff; and that later the defendants, through the Eureka Pipe Line Company, to further accomplish their purpose of ruining the plaintiff, built a branch pipe line through territory which had for years patronized the plaintiff's line, in order to prevent and forestall the plaintiff from transacting, acquiring, or maintaining any business, and from extending its line to any other territory; and that the defendants and confederates, by their monopoly and control over the oil business, refused to ship, or permit others to ship, oils, or buy oils shipped through the plaintiff's line, and, being the only refiners of oil at Parkersburg and elsewhere, refused to buy oil shipped through the pipe line of the plaintiff. At first blush this conduct might appear wrong; but a second thought again presents the question whether the defendants in this did anything unlawful. The defendant companies were all in common interest. Could they not unite to further their interests? Could not the Standard Oil Company buy from whom it chose? And within the pale of this right could it not impose such conditions as it chose? Cannot the village merchant say to the farmer, "I will not buy your eggs unless you buy my calico?" Cannot the big mill owner refuse to buy wheat from those who do not ship it over a railroad or steamboat line owned by him? Cannot the mill owner refuse to lease his farm to those who do not sell products to his mill? He may be exacting and oppressive, but can other mill owners sue him for this? Is this right not a part and parcel of his business right? It is the right, even when there is no common ownership, as there is in this case, of one man to buy of whom he chooses; and he can impose arbitrary, hard conditions, if the other party chooses to accede to them. So it is the clear right of the other party to sell to whom he chooses, and he having this right, how does the other party

do a wrong in purchasing from him? The right of the one carries with it the right of the other. These producers of oil had the right to sell to whom they chose, to ship their oil by what pipe line they chose, and they had the right to submit to the terms of the Standard Oil Company, and in view of this right the company could buy from whom it chose, and on such terms as it chose; for the right of the former would bear no fruitage, would be futile, without the corresponding right of contract in the company. Observe the question here is not their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise by the defendants of a right of constitutional liberty, accorded alike to all, — simply the right of self-advancement in legitimate business, self-preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard we do not yet know, but we do know that thus far the law of the survival of the fittest has been inexorable. Human intellect — human laws — cannot prevent these disasters. The dead and wounded have no right of action from the working of this imperious law.

We reverse and remand.[1]

[1] *Compare:* Mogul S. S. Co. *v.* McGregor, 23 Q. B. D. 598; Allen *v.* Flood, 1898 D. C. 1; Quinn *v.* Leatham, 1901 A. C. 495; Doremus *v.* Hennessy, 176 Ill. 608; Thurdley *v.* R. R., 48 S. W. 429; Guethler *v.* Altman, 60 N. E. 355 (Ind.); Brewster *v.* Miller, 101 Ky. 368; Graham *v.* R. R., 47 La. Ann. 215; Plant *v.* Woods, 176 Mass. 492; Bohn Co. *v.* Hollis, 54 Minn. 223; Assn. *v.* Cumming, 63 N. E. 369 (N. Y.); Payne *v.* R. R., 3 Lea, 507; Delz *v.* Winfrees, 80 Tex. 400; Reycroft *v.* Traintor, 68 Vt. 219. — Ed.

CHAPTER II.

OBLIGATIONS OF PUBLIC CALLING.

Section I. To serve All.

KING *v.* LUELLIN.

King's Bench, 1703.

[12 *Mod.* 445.]

The defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the smallpox; and it was quashed for not saying he was a traveller.

JENCKS *v.* COLEMAN.

Circuit Court of the United States, 1835.

[2 *Sum.* 221.]

Case for refusing to take the plaintiff on board of the steamboat "Benjamin Franklin" (of which the defendant was commander), as a passenger from Providence to Newport. Plea, the general issue.

The facts, as they appeared at the trial, were substantially as follow: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors to carry all the passengers, who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. And, in order to counteract the effect of this contract, — which had been offered the Tremont line, and declined, — that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats, and in this instance, refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

The cause was argued by *R. W. Greene* and *Daniel Webster* for the plaintiff, and by *Rivers* and *Whipple* for the defendants.

For the *plaintiff* it was contended, that steamboat proprietors were common-carriers,— and every person, conducting himself with propriety, had a right to be carried, unless he had forfeited that right.

The plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried by any improper misconduct.

The steamboat proprietors and Citizens' Coach Company had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage.

The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited, — that was to be done only on the passage from Newport to Providence.

For the *defendant*, it was contended, that the contract made by the steamboat proprietors and the Citizens' Company, was legal, and subserved the public convenience, and the interest of the proprietors of the boats and stages; it insured to the passengers expeditious passages

at reasonable prices; that the regulation, excluding the agents of the Tremont line of stages from the steamboats, was legal and just, because it was necessary to promote the foregoing objects, to wit: the public convenience, and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

STORY, J., in summing up to the jury, after recapitulating the evidence, said: There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right, but it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on

both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to

transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may in good faith make such contracts, to promote their own, as well as the public interests.

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to ensure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

Webster, for the plaintiff, then requested the Court to charge: That the jury must be satisfied that this agreement was necessary or clearly expedient for the public interest, and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it, by refusing the plaintiff a passage; Or, that the defendant must show that the substantial interest of the proprietors, or of the public, required an arrangement, such as they had entered into, in order to justify their refusal to carry the plaintiff for the cause assigned.

The Court refused to give instruction in the manner and form as prayed; but did instruct the jury, that it is not necessary for the defendant to prove, that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient, if it was entered into by the steamboat proprietors *bona fide* and purely for the purpose of their own interest, and the accommodation of the public, from their belief of its necessity, or its utility. If the jury should be of opinion that, under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. *Verdict for defendant.*

BENNETT *v.* DUTTON.

SUPREME COURT OF NEW HAMPSHIRE, 1839.

[10 *N. H.* 481.]

CASE. The declaration alleged that the defendant was part owner, and driver, of a public stage coach, from Nashua to Amherst and Francestown — that on the 31st January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence that at the time of the grievance alleged there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua — that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other — that Tuttle's line ran no farther than from Lowell to Nashua — that French and the proprietors of the defendant's line were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown — that French and the proprietors of the defendant's line had agreed to run their respective coaches so as to form a continuous line for passengers from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance, at such rates of fare as they thought expedient; and the amount thus received, in instances where they thought proper to receive less than the regular fare, was to be divided between said proprietors, in proportion to the length of their respective routes — that it was also agreed that if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and be at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell; and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same, for the conveyance of such passengers above Nashua — and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line, that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua on the same day, in Tuttle's line; the time of starting from Lowell and arriving at Nashua being the same in both lines.

One of the requisitions of mail contracts is, that each line of stage coaches running into another, so as to form a continuous mail line, shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the lines before mentioned, running to other places, through

Nashua; and it was generally the understanding between their respective proprietors that one line should not take, for a part of the distance where the route was the same, passengers who were going on further in another line; though this understanding had been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified by the agent for the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received at Nashua into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

Clark & G. Y. Sawyer, for the plaintiff, cited Story on Bailment, 380; 2 Ld. Raym. 909, Coggs *v.* Bernard; Jones on Bailment, 109; 2 Barn. & Adolph. 803, Kent *v.* Shuckard.

Baker (with whom was *C. G. Atherton*), for the defendant. It is not denied that anciently a common carrier was liable for refusing to carry goods; a common innkeeper for refusing to receive a guest; a common ferryman for refusing to carry a passenger; and generally, perhaps, that there was an implied obligation upon every one standing before the public in a particular profession or employment to undertake the duties incumbent upon it; though no case is recollected in which it has been determined that the proprietor of a stage coach is liable for refusing to receive a passenger. 2 Black. 451; 3 Black. 165; 1 Bac. Ab. 554; 1 Vent. 333; 2 Show. 327; Hard. 163; Rob. Ent. 103.

Formerly it was held that where a man was bound to any duty, and chargeable to a certain extent by operation of law, he could not, by any act of his own, discharge himself (1 Esp. R. 36; Noy's Maxims, 92; Doc. & Stud. 270), though it is now well settled that this obligation may be limited.

A liability for refusing to receive a passenger may be qualified by notice. Without notice a common carrier stands in the situation of an insurer. This obligation the law imposes upon him the moment he takes upon himself the duties of carrier. His contract with the public is as an insurer; and if goods are committed to his care while standing in this relation, he is liable as such. 6 Johns. 160; 3 Esp. 127; Selw. N. P. 395; 1 Wils. 181; 1 Inst. 89; 1 T. R. 33, 57; 5 T. R. 389; Story on Bailment, 328; 11 Pick. 42; 4 N. H. Rep. 306.

But this contract, which is general with the public, may be made

special. One who proposes to carry goods may undertake the business, not of a common, but of a special, carrier. He may give notice, when he commences business, that he does not assume all the responsibilities of a common carrier, technically so called; that he will be liable to a certain extent, and upon certain conditions, and no farther. He may thus discharge himself from all responsibility, except perhaps in cases of gross negligence. 3 Stark. 337; 3 Camp. 27; Story on Bail. 338, 357; 3 Taunt. 271; 4 Camp. 41; Jones on Bail. 104; 6 East, 564; 4 Esp. 178; 1 H. Black. 298. But the carrier is not liable for refusing to receive what he is under no obligation to carry (16 East, 244), so that the carrier of goods may not only qualify his responsibility for the safe transportation of goods, but his liability for refusing to receive them.

The principle to be derived from these cases, and upon which they all rest, is, that although the law imposes certain obligations upon one who undertakes the duties of a particular profession or employment, he is at liberty to assume those duties but in part, and thus limit his responsibility, provided he gives notice of his intention, generally, and that notice is brought home to the knowledge of the party interested. The principle is confined to no one branch or department of business; to no one case or class of cases. Nothing more is required than that public notice should be given how far the carrier intends to limit his responsibility, and that it should be known to the person to be affected by it in season to save his interest. The main point is to show the intention of the carrier, and to communicate knowledge of his terms, seasonably, to the individual interested. 5 East, 510; 2 Camp. 108; 1 Stark. Cas. 418; 2 Ditto, 461; 4 Burr. 2298; 1 Str. 145; 1 Bac. Abr. 556; 2 Stark. Ev. 338; 1 Pick. 50. And, provided the intention be manifest, it is not material whether any other person may have known the conditions, except the party whose interest they may affect. 1 Str. 145; 4 Burr. 2298; 2 Stark. Cas. 461.

But, yielding these points, it is contended that the defendant is not liable. It was competent for him to make all such rules and regulations as might be necessary for the convenient and successful prosecution of the employment in which he was engaged. To prosecute this employment, to discharge his duties to the public, and particularly to the post-office department, it became necessary that some such arrangement as this should be made. It was as proper that he should prescribe the place where a passenger should be received as the time when he should be received. It was not a refusal to receive all passengers, or this one in particular, but merely the regulation of the mode in which they would be received. Persons going from Nashua to Francestown were received at Nashua. Persons going from Lowell to Francestown were received at Lowell. This was all that the defendant did. It was a mere regulation; not a refusal to discharge a duty imposed by law.

PARKER, C. J. It is well settled that so long as a common carrier has convenient room he is bound to receive and carry all goods which

are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailment, 328; 5 Bing. R. 217, Riley *v.* Horne.

And stage coaches, which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. 2 Sumner, 221; Jencks *v.* Coleman; 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. 8 N. H. Rep. 523, Markham *v.* Brown. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stage coach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach, and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages, from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case or class of cases, on account of their agreement with French.

It is further contended, that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell, and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided in New York that stage coach proprietors are answerable, as common carriers, for the baggage of passengers, that they cannot restrict their common law liability by a general notice that the baggage of passengers is at the risk of the owners, and that if a carrier can restrict his common law liability, it can only be by an express contract. 19 Wend. 234, Hollister *v.* Nowlen. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. 19 Wend. 251, Cole *v.* Goodwin. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business ; nor was the plaintiff to be punished because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage ; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

PEARSON *v.* DUANE.

SUPREME COURT OF THE UNITED STATES, 1867.

[4 *Wall.* 605.]

IN the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. Pearson ascertained that Duane had been expelled from California, and put Duane aboard the steamer Sonora. Duane filed a libel in admiralty for damages.[1]

Mr. JUSTICE DAVIS delivered the opinion of the court.

This case is interesting because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.[2]

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose

[1] The statement of facts has been condensed. — ED.

[2] Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.[1] Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But the sum of four thousand dollars awarded as damages in this case is excessive, bearing no proportion to the injury received.[2] . . . We are of opinion that the damages should be reduced to $50.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court. *Order accordingly.*

CHICAGO & NORTHWESTERN RAILWAY *v.* WILLIAMS.

Supreme Court of Illinois, 1870.

[55 *Ill.* 185.]

Mr. Justice Scott delivered the opinion of the court.

There is but one question of any considerable importance presented by the record in this case.

It is simply whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts — that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies'

[1] Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

[2] The discussion of this point is omitted. — Ed.

car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car on appellants' train there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. *v.* Whittemore, 43 Ill. 423, that for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane, or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order, and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance the rule that set apart a car for the exclusive

use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State *v.* Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. *v.* Miles, 55 Penn. 209, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations, or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travellers, must be held to have no right to discriminate between passengers on account of color, race, or nativity alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation, and indignity to which the ap-

pellee was exposed if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict. But we apprehend that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation, and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

THE D. R. MARTIN.

CIRCUIT COURT OF THE UNITED STATES, SO. NEW YORK, 1873.

[11 *Blatch.* 233.]

HUNT, J. On the trial before the District Judge, the libellant, David F. Barney, recovered the sum of $1,000, as his damages for ejecting him from the steamboat D. R. Martin, on the morning of October 23, 1871. On an application subsequently made to him, the District Judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board of the boat, that he persisted in it against the remonstrance of the claimant, and that it was to prevent the transaction of that business by him on board of the boat, that he was ejected therefrom by the claimant. The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company, or a railroad company, is not bound to furnish travelling conveniences for those who wish to engage, on their vehicles, in the business

of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority. (Story on Bailments, § 591*a*; Jencks *v.* Coleman, 2 Sumner, 221; Burgess *v.* Clements, 4 Maule & Sel., 306; Fell *v.* Knight, 8 Mee. & W., 269; Commonwealth *v.* Power, 1 Am. Railway Cases, 389.) These cases show that the principle thus laid down is true as a general rule. The case of The N. J. Steam Nav. Co. *v.* Merchants' Bank (6 How. 344) shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss, if he allows them to be brought on board. It is the simplest justice that he should be permitted to protect himself by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission, as freight, of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellants carried a carpet bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other. But, if the service and the business had been precisely like that of the libellant the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired, for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the claimant's boat, or to do a limited express business thereon, this gave the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car, belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company or a railroad company, may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot

blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business.

It is insisted that the libellant could not legally be ejected from the boat for any offence, or violation of rules, committed on a former occasion. It is insisted, also, that, having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In Commonwealth *v.* Power, (7 Met. 596,) the passenger had actually purchased his ticket, and the Chief Justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his assistants were justified in forcibly removing him from the depot." In Pearson *v.* Duane, (4 Wallace, 605,) Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libellant, in this case, refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit, his removal from the boat. This was done with no unnecessary force, and was accompanied by no indignity. In my opinion, the removal was justified, and the decree must be reversed.[1]

BROWN *v.* MEMPHIS & C. RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, W. TENN., 1880.

[5 *Fed.* 499.]

THIS was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking-car. At the time of her

[1] *Acc.* Barney *v.* Oyster Bay & H. S. B. Co., 67 N. Y. 301. — ED.

exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was lady-like and inoffensive.[1]

The defendant pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

Hammond, District Judge, charged the jury that the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theatres, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from travelling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.[2]

The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others travelling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men. *Verdict for the plaintiff.*

[1] Part of the statement of facts and part of the charge are omitted. — Ed.

[2] See Brown *v.* R. R., 4 Fed. 37. — Ed.

STATE v. STEELE.

SUPREME COURT OF NORTH CAROLINA, 1890.

[106 *N. C.* 766; 11 *S. E.* 478.]

THIS was a criminal action, tried before CHARLES A. MOORE, Judge, and a jury, at the October term of the Criminal Court of Buncombe County, on an appeal from a court of a justice of the peace of said county.[1] . . .

The court charged the jury as follows: —

"If you shall find from the evidence that others engaged in the same business as the prosecutor were permitted by the defendant to go to the Battery Park Hotel for the same purpose for which the prosecutor went there, — that is, to secure and transact business for his employer's livery stable, — then the prosecutor had also the right to go there for that purpose at reasonable times, and to remain there a reasonable length of time for the transaction of such business; and it would not matter that the rules of the hotel forbade his entering the premises of the hotel for that purpose, or that he had been previously forbidden, in writing, to come upon the premises of the hotel, nor would it matter that the defendant had designated a place at the back of the hotel where livery-men could transact their livery business with the guests of the hotel, through the servants and employes of the hotel, even though the prosecutor knew of such place being so designated. He would not, however, have the right to go there at all times, nor would he have the right to remain there all the time, or an unreasonable length of time, for the transaction of such business, against the will of the owner or manager." . . .

AVERY, J. It was formerly held by the courts of England that where an innkeeper allured travellers to his tavern by holding himself out to the public as ready to entertain them, and then refused to receive them into his house when he had room to accommodate them, and after they had tendered the money to pay their bills, he was liable to indictment. But this doctrine, says Bishop (Volume I. § 532, Crim. Law), "has little practical effect at this time, being rather a relic of the past than a living thing of the present." Rex *v.* Luellin, 12 Mod. 445. In a *dictum* in State *v.* Matthews, 2 Dev. & B. 424, this old principle was stated with some qualification, viz., that "all and every one of the citizens have a right to demand entertainment of a public innkeeper, if they behave themselves, and are willing and able to pay for their fare; and, as all have a right to go there and be entertained, they are not to be annoyed there by disorder, and if the innkeeper permits it he is subject to be indicted as for a nuisance." Rommel *v.* Schanbacker, 120 Pa. 579. The duty and legal obligation resting upon the landlord is to admit only

[1] Part of the statement of facts is omitted. — ED.

such guests as demand accommodation, and he has the right to refuse to allow even travellers who are manifestly so filthy, drunken, or profane as to prove disagreeable to others who are inmates, and thereby to injure the reputation of his house, to enter his inn for food or shelter, though they may be abundantly able to pay his charges. 2 Whart. Crim. Law, § 1587; Reg. *v.* Rymer, 13 Cox, Crim. Cas. 378. The right to demand admission to the hotel is confined to persons who sustain the relation of guests, and does not extend to every individual who invades the premises, not in response to the invitation given by the keeper to the public, but in order to gratify his curiosity by seeing, or his cupidity by trading with, patrons who are under the protection of the proprietor. 1 Whart Crim. Law, § 625. The landlord is not only under no obligation to admit, but he has the power to prohibit the entrance of, any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and especially is this true when the very nature of the business is such that human experience would lead us to expect the competing "drummers," in the heat of excitement, not only to trouble the guests by earnest and continued approaches, but by their noise, or even strife. The guest has a positive right to demand of the host such protection as will exempt him from annoyance by such persons as intrude upon him without invitation and without welcome, and subject him to torture by a display of their wares or books, or a recommendation of their nostrums or business. That learned and accomplished jurist, Chief Justice Shaw, delivering the opinion in Com. *v.* Power, 7 Met. 600, said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests, yet he is not only empowered, but he is bound, so to regulate his house as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, and to repress and prohibit all disorderly conduct therein, and of course he has a right and is bound to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order." This principle was stated as an established one, and used by the court as an argument to sustain by analogy its ruling announced in a subsequent portion of the opinion, that a railroad company had a right by its regulations to exclude from its depot and cars, at any station, persons who visited them for the purpose of soliciting passengers to stop at particular hotels; and one of the reasons given for holding the regulation reasonable was that, where the agent urged the claims of their respective hotels "with earnestness and importunity, it was an annoyance to passengers." The doctrine is there laid down, too, that persons other than passengers *prima facie* have the right to enter the depot of a railroad company, as others besides guests may go into hotels, without making themselves trespassers, because in both instances there is an implied license given

to the public to enter. But such licenses in their nature are revocable, except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket-office, or hotel, as the case may be, if they are sober, orderly, and able to pay for transportation or fare. The court went further in that case, and held that, in enforcing the reasonable regulation against "drummers" for hotels at the depot, the servants of the railway company were not guilty of an assault for expelling by force, not excessive, a person who had repeatedly violated the regulation by going upon the platform and soliciting for a hotel, though on the particular occasion when he was ejected from it he had a ticket, and intended to take the train destined for another town, but failed to disclose to such servants the fact that he entered for "another purpose, when it was in his power to do so."

Were we to follow the analogy to which the principle laid down in that case would lead, an innkeeper could not only make and enforce a regulation forbidding persons to come on his premises for the purpose of soliciting his guests to patronize the livery stables that they might represent, but he might, in enforcing the rule against one who had previously violated it after notice that he should not do so, put such person off his premises, without excessive force, though at the particular time the person had entered with the *bona fide* intent to become a guest at the hotel, but failed to announce his purpose; or, under the same principle, he might expel by force one who becomes a guest, and takes advantage of his situation to subject other inmates of the house to the annoyance of "drumming" for such establishments. The same distinction is drawn between guests and others who enter an hotel intent on business or pleasure by the courts of Pennsylvania. In Com. *v.* Mitchell, 1 Phila. 63, and Com. *v.* Mitchel, 2 Pars. Eq. Cas. 431, it was held that an innkeeper is bound to receive and furnish food and lodging for all who enter his hotel as guests, and tender him a reasonable price for such accommodation; but "if an individual [other than a guest] has entered a public inn, and his presence is disagreeable to the proprietor or his guests, he has a right to request the person to depart, and, if he refuses, the innkeeper has the right to lay his hands gently upon him, and lead him out, and, if resistance is made, to employ sufficient force to put him out," without incurring liability to indictment "for assault and battery." . . .

[The learned judge here stated and commented upon the cases of Jencks *v.* Coleman, 2 Sum. 224; Barney *v.* Steam-Boat Co., 67 N. Y. 302; Harris *v.* Stevens, 31 Vt. 79; Old Colony R. R. *v.* Tripp, 147 Mass. 35.]

Upon a review of all the authorities accessible to us, and upon the application of well-established principles of law to the admitted facts of this particular case, we are constrained to conclude that there was error in the charge given by the court to the jury, because:

1. Guests of an hotel, and travellers or other persons entering it

with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in or put out by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons. Jencks *v.* Coleman, *supra;* Com. *v.* Mitchell, *supra;* Com. *v.* Power, *supra;* Pinkerton *v.* Woodward, 91 Amer. Dec. 660; Barney *v.* Steam-Boat Co., *supra;* 1 Whart. Crim. Law, § 621; Ang. Carr. §§ 525, 529, 530; Britton *v.* Railroad Co., 88 N. C. 536.

2. When persons unobjectionable on account of character or race enter an hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license that the landlord may revoke at any time; because, barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling-house, from which he may expel all who have not acquired rights, growing out of the relation of guest, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. Harris *v.* Stevens, 31 Vt. 79; 1 Whart. Crim. Law, § 625.

3. The regulation, if made by any innkeeper, that the proprietors of livery stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one, and, after notice to desist, a person violating it may be lawfully expelled from his house, if excessive force be not used in ejecting him. Com. *v.* Power, *supra;* Harris *v.* Stevens, *supra.* See, also, Griswold *v.* Webb, 16 R. I. 649; Railroad Co. *v.* Tripp, *supra.*

4. An innkeeper has unquestionably the right to establish a news-stand or a barber-shop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers; and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such a contract, the innkeeper may make, and after personal notice to violators, enforce, a rule excluding from his hotel the agents and representa-

tives of other livery stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, the proprietor may use sufficient force to expel him if he refuse to leave when requested, and may eject him, even though on a particular occasion he may have entered for a lawful purpose, if he does not disclose his true intent when requested to leave, or whatever may have been his purpose in entering, if he in fact has engaged in soliciting the patronage of the guests. Barney *v.* Steam-Boat Co., *supra;* Jencks *v.* Coleman, and Harris *v.* Stevens, *supra;* Ang. & A. Corp. § 530.

5. The broad rule laid down by Wharton (1 Crim. Law, § 625) is that "the proprietor of a public inn has a right to request a person who visits it, not as a guest or on business with a guest, to depart, and if he refuse the innkeeper has a right to lay his hands gently upon him, and lead him out, and, if resistance be made, to employ sufficient force to put him out; and for so doing he can justify his conduct on a prosecution for assault and battery." It will be observed that the author adopts in part the language already quoted from the courts of Pennsylvania.

6. If it be conceded that the prosecutor went into the hotel at the request of a guest, and for the purpose of conferring with the latter on business, still, in any view of the case, if, after entering, he engaged in "drumming" for his employer when he had been previously notified to desist in obedience to a regulation of the house, the defendant had a right to expel him if he did not use more force than was necessary; and if the prosecutor, having entered to see a guest, did not then solicit business from the patrons of the hotel, but had done so previously, the defendant, seeing him there, had a right to use sufficient force to eject him, unless he explained, when requested to leave, what his real intent was. Harris *v.* Stevens, and Com. *v.* Power, *supra.* The guest, by sending for a hackman, could not delegate to him the right to do an act for which even the guest himself might lawfully be put out of the hotel.

7. If we go further, and admit, for the sake of argument, that the principle declared in Markham *v.* Brown, 8 N. H. 530, and relied on to sustain the view of the court below, is not inconsistent with the law on the same subject, as we find it laid down by Wharton and other recognized authorities, still our case will be found to fall under the exception to the general rule stated in express terms in that case. The court said: "If one comes to injure his [the innkeeper's] house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here; and perhaps there may be cases in which he may have a right to exclude all but travellers and those who have been sent for by them. It is not necessary to settle that at this time." There was no evidence in Markham *v.* Brown that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury, if the agent who was

expelled was successful in his solicitations; and it seems that Angell and others, who cite as authority that case, as well as Jencks *v.* Coleman and Barney *v.* Steam-Boat Co., reconcile them by drawing the distinction that in the latter cases, and in the hypothetical case of an innkeeper, put by Justice STORY, the person whose expulsion was justified was doing an injury to the proprietor, who had him removed, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper. In using the language quoted above, Justice PARKER seems to have had in his mind, without referring to it, the opinion of Justice STORY, delivered in the circuit court but two years before (Jencks *v.* Coleman, *supra*).

8. The defendant, as manager of the hotel, could make a valid contract, for a valuable consideration, with Sevier, to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietors of the public house might legitimately share in the profits of any such incidental business, as furnishing carriages, buggies, or horses to the patrons, and for that purpose had as full right to close their house against one who attempted to injure the business in which they had such interest as the owner of a private house would have had, and this view of the case is consistent with the doctrine enunciated in Markham *v.* Brown. There was no evidence tending to show that Chambers had actual permission from the proprietors to approach the inmates of the hotel on the subject of patronizing him, nor that they had actual knowledge of the fact that he had continued his solicitations after receiving a similar notice to that sent to the prosecutor. The fact that he was overlooked or passively allowed to remain in the hotel (it may be under the impression on the part of the defendant that he had desisted from his objectionable practices) cannot, in any view of the law, work a forfeiture of the right to enforce a reasonable regulation, made to protect their legitimate business from injury. If, therefore, a permit on the part of the defendant to Chambers to "drum" gratuitously in the house would at once have opened his doors to all of the competitors of the latter (a proposition that we are not prepared to admit), the defendant did not, so far as the testimony discloses the facts, speak to him on the subject; and the soundness of the doctrine that, without interfering with the legal rights of the guests, the proprietor of a hotel is prohibited by the organic law from granting such exclusive privileges to any individual, as to the use or occupancy of his premises, as any other owner of land may extend, is not drawn in question. We therefore sustain the second and third assignments of error. His honor erred, for the reasons given, in instructing the jury that the guilt of the defendant depended upon the question whether he permitted Chambers or Sevier to solicit custom in the house. He had a lawful right to discriminate, for a consideration, in favor of Sevier, while it does not appear from the evidence

that he granted any exclusive privileges to Chambers. We hold that the regulation was such a one as an innkeeper had the power to make, and must not be understood as approving the idea that the sanction of the municipal authorities could impart validity to it, if it were not reasonable in itself, and within the powers which the law gives to proprietors of public houses in order that they may guard their own rights and protect their patrons from annoyance. For the reasons given the defendant is entitled to a new trial.[1]

HALE *v.* GRAND TRUNK RAILROAD.

SUPREME COURT OF VERMONT, 1888.

[60 *Vt.* 605; 15 *Atl.* 300.]

Ross, J.[2] By the agreed case, November 2, 1885, the defendant was operating a railway from Portland, Me., to Canada Line, and had a station at Berlin Falls, N. H. As such it was carrying the mail on its mail trains for the United States government, according to the laws of the United States, and pursuant to the conditions and regulations imposed by the post-office department, at a fixed compensation. The plaintiff, on that evening, in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded and, as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the post-office department it was then the duty of postal clerks on trains carrying the mail to receive at the cars among other things, from the public, letters on which the postage had been prepaid, and then to sell stamps with which to prepay such postage. Sections 720, 762, Instructions to Railway Postal Clerks. Hence, as a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member of the public, and was attempting to pass over the platform provided by the defendant to the mail train, for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government, the defendant became under the duty to furnish him a reasonably safe passage to its mail train, for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose the plaintiff was

[1] See Fluker *v.* Georgia R. R. & B. Co., 81 Ga. 461, 8 S. E. 529; Com. *v.* Power, 7 Met 596; Cole *v.* Rowen, 88 Mich. 219, 50 N W. 138; Smith *v.* New York, L. E. & W. R. R. 149 Pa. 249, 24 Atl. 304. — ED.

[2] The opinion only is given; it sufficiently states the case. — ED.

neither a trespasser, intruder, nor loafer, but was there to transact business, which the defendant had undertaken to do with him, for a compensation received from the government; in fact was there, at the invitation of the defendant, to transact business which it had been hired to perform for and with him, by the government. The duty of the defendant to furnish the plaintiff a reasonably safe passage to its mail train to mail his letters was none the less binding or obligatory because the compensation received therefor came from the government rather than the plaintiff. A. holds a regular passenger ticket over a railroad. The duty of the company operating the road to carry him safely is none the less binding, nor are his legal rights, if injured, in the least abridged because the ticket was paid for by the money of B., rather than with his own money. The government derives a large part of its revenue with which it pays for the mail service by the sale of postage stamps to whomsoever of the public may desire to use that arm of its service. The money which the plaintiff had paid for the postage stamps upon the letters he was carrying, or which he would have paid the postal clerk for stamps to use upon the letters, was indirectly a payment to the defendant for the service which it was about to perform for the plaintiff, in carrying the letters which he was about to post, on the way towards their destination. But whether the plaintiff paid indirectly to the defendant for the service and accommodations which it was under a duty to furnish him, or the government paid therefor, and gave it to the plaintiff, does not vary the defendant's duty to furnish him a reasonably safe passage to the mail car for the purpose of mailing his letters, nor are his legal rights thereby abated. Actionable negligence is a failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. They have also conceded in the agreed case that the plaintiff exercised due and proper care on the occasion. They only contend that the defendant was under no legal duty to furnish the plaintiff a reasonably safe passage to the mail car, for the purpose of mailing his letters, mainly because he was to pay the defendant nothing therefor directly. But, as we have already endeavored to show, that fact would not relieve the defendant from the duty, inasmuch as it was paid by the government for discharging that duty to the public; that is, to any person who had occasion to go to the mail car when stopping at regular stations to transact any lawful business with the servants of the government. These views would affirm the judgment of the county court, but, in accordance with the stipulation of the parties, that judgment is reversed *pro forma*, with costs to the plaintiff, and the cause remanded for trial.[1]

[1] See Bradford *v.* Boston & M. R. R , 160 Mass. 392, 35 N. E. 1131. — Ed.

PIERCE *v.* MILWAUKEE AND ST. PAUL RAILWAY CO.

SUPREME COURT OF WISCONSIN, 1868.

[23 *Wis.* 387.][1]

APPEAL from the Circuit Court for La Crosse County.

Action to recover the value of eight bundles of bags, which had been in use for two seasons in transporting grain from Lake City, Minnesota, to Genoa, Wisconsin, by way of the river and the defendant's railway. The complaint alleged that the bags were delivered by the packet company doing business on the river, to the defendant at La Crosse; and that defendant, as a common carrier, received said bags to be safely carried by it over its railway, and delivered at Milwaukee to the plaintiff, "for a reasonable compensation to be paid by the plaintiff therefor." Answer, a general denial. At the trial defendant sought to avoid liability, as a common carrier, for the loss of the bags, by showing a uniform and long-established custom of the river and railway, that all bags used in the transportation of grain on said river or railway were carried free of charge, when empty, claiming that for bags so carried it could be held responsible only in case of gross negligence.

PAINE, J. After carefully considering the original briefs of counsel and the arguments upon the rehearing, I have come to the conclusion that the carrying of the bags of the plaintiff by the company cannot be considered as gratuitous, whether the custom was only to return bags free that had gone over the road filled, or whether it was a general custom to carry the bags of customers free both ways, without regard to the question whether, at any particular time, they were returning from a trip on which they had passed over the road, filled or not. If such a relation were created by an express contract, instead of being based upon a custom, it would seem clear that there would be a sufficient consideration for the agreement to carry the bags. If a written contract should be signed by the parties, in which the one should agree to give the company the transportation of his grain at its usual rates, and the company should agree in consideration thereof to carry the grain at those rates, and also to carry the bags both ways whenever the customer might desire it, without any further charge, there can be no doubt that the giving to the company his business, and the payment of the regular freight, would be held to constitute the consideration for this part of the agreement on the part of the company. But if it would be so in such a case, it is equally so when the same understanding is arrived at through the means of a custom. The company, by establishing such a custom, makes the proposition to all persons, that if they will become its customers, it will carry their bags both ways without any other compensation than the freight upon the grain. Persons

[1] This case is abridged. — ED.

who become its customers in view of such a custom, do so with that understanding. And the patronage and the freights paid are the consideration for carrying the bags. The company, in making such a proposition, must consider that this additional privilege constitutes an inducement to shippers to give it their freight. And it must expect to derive a sufficient advantage from an increase of business occasioned by such inducement, to compensate it for such transportation of the bags. And it ought not to be allowed, when parties have become its customers with such an understanding, after losing their bags, to shelter itself under the pretext that the carrying of the bags was a mere gratuity, and it is therefore liable only for gross negligence.

It makes no difference that the custom is described as being to carry the bags *free*. In determining whether they are really carried "free" or not, the whole transaction between the parties must be considered. And when this is done, it is found that all that is meant by saying that the empty bags are carried free, is, that the customers pay no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous. Smith *v.* R. R. Co., 24 N. Y. 222; see also Bissel *v.* Railroad Co., 25 id. 442. It will be seen that in that case a majority of the court held, that where a passenger expressly agreed to take certain risks of injury upon himself, for a consideration, the agreement was valid and binding. But Denio, Wright, and Sutherland dissented, and Denio, J., in his opinion, on pages 455 and 456, states what seems to be the true construction and effect of such a contract, holding that a person riding in charge of cattle, under a contract to carry them at a specified price per car load, and to carry a person "free" to take charge of them, was not a gratuitous passenger. The other two dissenting justices doubtless agreed with him upon this point. And it is evident from the remarks of Selden, J., on page 447, that he did not hold the opposite view, but rested his decision upon the ground that the plaintiff was bound by the contract to take the risk, whether he was a gratuitous passenger or not. See also Steamboat New World *v.* King, 16 How. (U. S.) 469, in which it was held, that, under a general custom of steamboats to carry "steamboat men" free, a steamboat man, riding on a free ticket, was not to be regarded as a gratuitous passenger; but that the consideration was to be found in those advantages which induced the establishment of the custom — a doctrine which seems directly applicable to the question under consideration.

I can see no ground for any such difficulty as that suggested by the appellant's counsel on the re-argument. He said, if this undertaking to return bags free was to be considered a matter of contract on the part of the company, it would be unable to collect its freights on delivering grain, upon the ground that its contract was not then completed. But this could not be so. The company, on delivering the grain, parts with the possession of the property to the shipper or his consignee.

And on doing that, it is of course entitled to its freight. And its agreement to return the bags without further charge, or to carry them free both ways whenever its customer should deliver them empty for that purpose, could not have the effect of destroying this right. The contract would be construed according to the intention of the parties. See Angell on Carriers, § 399, note 3, and cases cited. And here it would be very obvious that neither of the parties contemplated any relinquishment by the company of its right to freight on delivering the grain. The transaction for that purpose would be distinct. Here the defendant's evidence showed that the plaintiff was a "customer." The company claims that he had complied with the custom on his part, so as to make it applicable to him. But if he had done so, as that constitutes a sufficient consideration to prevent the carrying of his bags from being gratuitous, the company is liable.

It is immaterial, therefore, whether the instruction excepted to was strictly accurate or not, in assuming that there was evidence tending to show that the bags were on a return trip, after having gone over the road filled; as neither in that case, nor on the custom as claimed to have been shown by the appellant, would the transportation be gratuitous.

By the Court. The judgment is affirmed, with costs.[1]

WILSON *v.* GRAND TRUNK RAILWAY.

Supreme Court of Maine, 1868.

[56 *Me.* 60.[2]]

Appleton, C. J. The plaintiff was a passenger on board the defendants' cars, having seasonably paid her fare. Her baggage was not with her, it having been left behind, without fault of the defendants. Some two or three days afterwards it was left in charge of their servants, to be transported to the Empire station on their line, but it never reached its place of destination. This suit is brought to recover the value of the baggage lost.

The presiding justice instructed the jury, "That, if they should find that the plaintiff went on board the defendants' road as a passenger, on Tuesday preceding, without baggage, and that the trunk and its contents were ordinary personal baggage, such as a passenger would be entitled to take with himself without extra charge, it was not necessary that there should be proof that anything was paid for carrying the trunk between the same points; that the price paid by the plaintiff, for

[1] *Compare:* Knox *v.* Rues, 14 Ala. 249; Chouteau *v.* Anthony, 20 Mo. 549; Pender *v.* Robbins, 6 Jones L. 207; Spears *v.* Lake Shore R. R., 67 Barb. 513; Dudley *v.* Ferry Co., 42 N. J. L. 25. — Ed.

[2] Opinion only is printed. — Ed.

her own passage, and the evidence in the case, if found to be true, were sufficient consideration for the promise alleged in the writ."

As the plaintiff's trunk was taken for transportation some days after she had passed over the defendants' road, the substance of the charge of the presiding judge was, that the price paid for the plaintiff's ticket included the compensation due to the defendants for their subsequent transportation of her trunk, the trunk being personal baggage. In other words, it was not necessary that the baggage of the passenger should go with the passenger, but, it might be afterwards subsequently and without any additional charge for its freight.

The fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers. There need be no distinct contract for the carriage of the baggage. The fare covers the compensation for the freight of the baggage. The baggage must be ordinary baggage, such as a traveller takes with him for his personal comfort, convenience, or pleasure for the journey. It must be the "ordinary luggage" of a traveller, regard being had to the journey proposed.

It is implied in the contract that the baggage and the passenger go together. "The general habits and wants of mankind," observes Erle, C. J., in Phelps *v.* L. & N. W. Railway Co., 115 E. C. L. 327, "must be taken to be in the mind of a carrier when he receives a passenger for conveyance; and the law makes him responsible for all such things as may be fairly carried by the passenger for his personal use." In Cahill *v.* L. & N. W. Railway Co., 100 E. C. L. 172, Willes, J., says, "When a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only; and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." In Smith *v.* Railroad, 44 N. H. 330, Bellows, J., uses the following language: — "Until a comparatively recent period the English courts were inclined to hold that carriers of passengers by stage-coaches, and otherwise, were not liable for injuries to their baggage, unless a distinct price was paid for its transportation. But it is now well settled that the price paid for the passenger includes also the personal baggage required for his personal accommodation; the custody of the baggage being regarded as accessory to the principal contract. . . . In general terms it may include, not only his personal apparel, but other conveniences for the journey, such as a passenger usually has with him for his personal accommodation." "The baggage," observes Mullin, J., in Merrill *v.* Grinnell, 30 N. Y. 619, "must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making."

It follows from the nature and object of the contract, that the right of the passenger is limited to the baggage required for his pleasure,

convenience, and necessity during the journey. As it is for his use and convenience, it must necessarily be with him, as it is for him. He may reasonably be expected to exercise some supervision over it during, and be ready to receive it, at the termination of his journey. In the present case the baggage was forwarded two days after the plaintiff had passed over the road. If its transmission may be delayed two days and the carrier is required to take it without any compensation save the fare paid by the passenger, who had preceded it, it may equally be delayed weeks or months and the carrier be required to forward it without any additional pay. It presents a different question if the delay is caused by the fault of the carrier, or there is a special agreement with him or his authorized agent for the subsequent transportation of the passenger's baggage.

The fare paid by a passenger over a railroad, is the compensation for his carriage, for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or of negligence on his part, is liable, like any other article of merchandise, to the payment of the usual freight.

The declaration is in the usual form against carriers. It is well settled that the carrier need not be paid in advance, unless he specially demand it, and that he has a lien on the goods carried for his freight. It is not necessary to determine whether or not the defendants would be liable for the trunk as common carriers of merchandise for compensation. The case, as presented to the jury and as argued before us, raises the single question of the obligation of the carrier of passengers to take their baggage at a time subsequent to that of the carriage of the passenger, without additional compensation.

Exceptions sustained.

Kent, Dickerson, Barrows, Danforth, and Tapley, JJ., concurred.[1]

WOODS *v.* DEVIN.

Supreme Court of Illinois, 1852.

[13 *Ill.* 746.[2]]

Treat, C. J. This was an action on the case brought by Devin against Woods. The declaration alleged, in substance, that the plaintiff, on the 7th of August, 1851, delivered on board the steamboat "Governor Briggs," then lying at Peoria, and owned by the defendant

[1] *Compare :* Beers *v.* Boston R. R., 67 Conn. 417; Perkins *v.* Wright, 37 Ind. 27; Warner *v.* Burlington, &c. R. R., 22 Ia. 166; Flint R. R. *v.* Weir, 37 Mich. 111; Chesapeake, &c. R. R., *v.* Wilson, 21 Grat. 654. — Ed.

[2] Opinion only is printed. — Ed.

and used by him in the transportation of passengers and freight on the Illinois River between Peoria and La Salle, a carpet-bag containing one case of duelling-pistols, one pocket-pistol, and various articles of wearing apparel, of the value of $200, to be carried on said boat from Peoria to La Salle for a certain reward, and that the defendant received the same for the purpose aforesaid; yet the defendant, not regarding his duty in the premises, did not deliver the carpet-bag and contents at La Salle, but, on the contrary, lost the same. The plea was, not guilty.

It appeared, in evidence, that on the 7th of August, 1851, the plaintiff was about to take a journey from Peoria to the city of New York, and engaged his passage for La Salle in the steamboat "Governor Briggs," then owned by the defendant, and run by him on the Illinois River between Peoria and La Salle for the conveyance of passengers and freight; that the plaintiff sent his trunk and carpet-bag to the boat as she was about to leave Peoria for La Salle, and the same were received on board by the direction of the defendant; that the plaintiff left the boat temporarily, and while absent on shore the carpet-bag was stolen and rifled of its contents, and the same were never recovered by him; that he did not proceed on his journey in consequence of the loss of the carpet-bag; that the plaintiff did not pay his fare for the passage, nor was there any express contract for the carriage of the trunk and carpet-bag; that the carpet-bag contained articles of wearing apparel of the value of $36, a pair of duelling-pistols of the value of $25, and a pocket-pistol of the value of $15.

The court refused to give the following instructions asked by the defendant: "That if the carpet-bag was merely baggage as is usual for passengers to carry, and was designed as such by the plaintiff, the plaintiff cannot recover under this declaration, and the jury will find for the defendant. If the carpet-bag was for the purpose and use of carrying clothing, &c., the plaintiff cannot recover for the contents of the bag, except for such articles as are usually carried by travellers; and the jury are the judges whether or not the pistols mentioned are usually a portion of the baggage of a travelling gentleman, and if not, the jury will not allow any amount for the pistols."

The jury found the issue in favor of the plaintiff, and assessed his damages at $73.75. The court overruled a motion for a new trial, and gave judgment on the verdict.

A common carrier of passengers is responsible for the baggage of a passenger. His duty in this respect is the same as that of a common carrier of goods; and he can only excuse himself for the non-delivery of the baggage of a passenger by showing that it was lost by the act of God or of the public enemy. His responsibility commences when the baggage is delivered to him or his authorized agent. The Camden and Amboy Railroad *v.* Belknap, 21 Wend. 354. His compensation for carrying the baggage is included in the fare of the passenger. The Orange County Bank *v.* Brown, 9 Wend. 85; Hawkins *v.* Hoffman,

6 Hill, 586. Prepayment of the fare is not necessary in order to charge the carrier for the loss of the baggage. The Citizens' Bank *v.* The Nantucket Steamboat Company, 2 Story's R. 16. He has a remedy by action on the implied contract of the passenger to pay the customary fare; and he has also a lien on the baggage, which he is not compelled to deliver until the fare is paid. Angell on Carriers, § 375; Story on Bailments, § 604. By not requiring the fare to be paid in advance, he relies for remuneration on the remedies indicated.

In the present case, the defendant was a common carrier of passengers. The plaintiff engaged a passage to La Salle, and sent his baggage to the boat. The moment it was received on board the defendant became responsible for its safe delivery at the port of destination, loss occasioned by inevitable accident or the public enemies only excepted. The carpet-bag was stolen from the boat and never recovered by the plaintiff. Loss by theft is not within either of the exceptions to the risk of a common-carrier. The defendant is therefore chargeable with the value of the articles in the carpet-bag, unless they are not to be regarded as forming a part of the baggage of a traveller. It is conceded that the articles of wearing apparel were properly baggage; and the only question is in respect to the pistols. What constitutes the baggage of a traveller, for the loss of which a common carrier is liable, is a question of some practical importance, and one that has been much considered in reported cases. It is argued in all the cases that the term "baggage" includes the wearing apparel of the traveller. In the Orange County Bank *v.* Brown, *supra*, the trunk of a passenger containing $11,250 in money belonging to the bank was lost; and the bank sought to recover the amount of the carrier, on the ground that it was part of the baggage of the passenger. But the court decided that the money did not fall within the term baggage; and that the attempt to carry it free of reward under cover of baggage was an imposition on the carrier. In Pardu *v.* Drew, 25 Wend. 457, where a trunk containing valuable merchandise, and nothing else, was taken on board of a boat by a passenger, and deposited with the ordinary baggage, it was held that the carrier was not chargeable for its loss. In Hawkins *v.* Hoffman, *supra*, it was decided that the term "baggage" did not embrace samples of merchandise carried by a passenger in his trunk for the purpose of enabling him to make bargains for the sale of goods. In Cole *v.* Goodwin, 19 Wend. 251, and Weed *v.* The Saratoga and Schenectady Railroad Company, 19 Wend. 534, the court held that a carrier was liable for money in the trunk of a passenger not exceeding a reasonable amount for travelling expenses. In Jones *v.* Voorhees, 10 Ohio, 145, a carrier was made liable for the value of a gold watch lost from the trunk of a passenger. In McGill *v.* Rowand, 3 Barr. 451, the husband was permitted to recover of the carrier the value of his wife's jewelry which had been taken from her trunk on the coach in which she was a passenger. In Porter *v.* Hildebrand, 2 Har. 129, the court held that a carpenter might recover from a carrier the value

of tools contained with clothing in his trunk, which the carrier had lost, the jury having found that they were the reasonable tools of a carpenter.

The principle of the authorities is, that the term "baggage" includes a reasonable amount of money in the trunk of a passenger intended for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and that it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger. A more definite rule cannot well be laid down. The remarks of Bunson, J., in Hawkins *v.* Hoffman, *supra*, are pertinent. He says, "It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for instruction or his amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such."

We think the articles in question formed a part of the baggage of the plaintiff, and as such come within the risk of the carrier. They were not carried for purposes of sale or traffic, but for the personal use and protection of the passenger; and it is not unusual for such articles to be carried in the trunks of travellers.

There was no substantial variance between the declaration and the evidence. The declaration alleged that the defendant received the carpet-bag, to be carried from Peoria to La Salle for a reward. The proof clearly sustained the averment. It indeed showed in addition, that the plaintiff engaged a passage for the same destination, and that he had other baggage. But as the only cause of complaint against the defendant was the loss of the carpet-bag, it was not necessary to state the additional matter in the declaration, especially in an action on the case for the breach of the common-law duty of the carrier. It might perhaps be otherwise in an action of assumpsit on the contract of the carrier. See Weed *v.* The Saratoga and Schenectady Railroad Company, *supra*.

The judgment is affirmed. *Judgment affirmed.*[1]

[1] *Compare:* Hudston *v.* Midland R. R., L. R. 4 Q. B. 366; Fraloff *v.* New York R. R., 100 U. S. 24; Hickox *v.* Naugatuck R. R., 31 Conn. 281; Staub *v.* Kendrick, 121 Ind. 226; Connolly *v.* Warren, 106 Mass. 146; Porter *v.* Hildebrand, 14 Pa. St. 149; Oakes *v.* No. Pacific R. R., 20 Ore. 392. — Ed.

WEISENGER *v.* TAYLOR.

COURT OF APPEALS, KENTUCKY, 1866.

[1 *Bush*, 275.[1]]

ROBERTSON, J. The appellant, Henry Weisenger, sued the appellees, J. M. and G. H. Taylor, for $90, stolen from a room occupied by him while a guest in their public inn; charging that the loss resulted from their culpable negligence.

The Circuit Court sustained a demurrer to the petition, and, on failure to amend, dismissed it.

The common, like the civil law, but even more stringent, exacts of inn-keepers, as bailees of the baggage and goods of their guests, extraordinary care, and imposes on them a responsibility nearly commensurable with that of common carriers, approximating insurance of such articles when confided expressly or impliedly to their custody and care. But whenever the guest assumes the custody and control of his goods in such a way as to indicate that he does not trust the inn-keeper, and concedes to him no control, they are not in the implied custody of the inn-keeper, and he is therefore not responsible, unless they shall be stolen by some of his own household, whose honesty and fidelity he is presumed to guarantee.

The inn-keeper's responsibility is only co-extensive with his custody and control, and his pledge of the integrity of his servants. And the question of custody and control depends on facts indicative of intention. If the guest, having an article not attached to his person, nor carried about with him for his personal convenience — such, for example, as a bag of gold, a case of jewelry, or a package of paper currency — the fact that he does not either notify the host of it, or offer to place it in his actual custody, would imply that he trusted to his own care, and intended to risk all consequences. And, if the article thus held by himself alone should be stolen from him while abiding in the inn, the loss, like the preferred custody, might be his own alone, unless it resulted from the dishonesty of some of the household. The inn-keeper, deprived of both custody and control, could not be held responsible on any just or consistent principle.

But such articles as apparel worn at the time, and watch and pocket money, are not expected to be delivered to the inn-keeper for safe-keeping, and the retention of them in the guest's room neither keeps them from the implied custody of the inn-keeper, nor implies a waiver of his responsibility. In respect to such articles, therefore, thus kept, the inn-keeper is *prima facie* the responsible curator. And it seems to us that the $90 kept in the appellant's pocket for daily use for incidental expenses, should be considered as embraced in this last category.

[1] Opinion only is printed. — ED.

This being so adjudged, the petition contains every allegation necessary to show a cause of action to be tried on a proper issue of fact.

Wherefore, the judgment is reversed, and cause remanded for further pleadings and proceedings.[1]

BUCKLAND *v.* ADAMS EXPRESS CO.

SUPREME COURT OF MASSACHUSETTS, 1867.

[97 *Mass.* 124[2].]

CONTRACT to recover the value of a case of pistols.

BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight *v.* Brewster, 1 Pick. 50, 53; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; 2 Redfield on Railways, 1–16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the

[1] *Compare:* Lanier *v.* Youngblood, 73 Ala. 587; Matter *v.* Brown, 1 Cal. 221; Sassen *v.* Clark, 37 Ga. 242; Giles *v.* Fantelroy, 13 Md. 434; Smith *v.* Wilson, 36 Minn. 334; Scheffer *v.* Wilson, 5 S. Dak. 233. — ED.

[2] This case is abridged. — ED.

duties and liabilities of carriers, having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship

in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered.[1]

Exceptions overruled.

FERGUSON *v.* THE METROPOLITAN GAS LIGHT COMPANY.

New York Common Pleas, 1868.

[37 *How. Pr.* 189.]

By the court, Brady, J. The plaintiff occupied one floor of a dwelling or tenement house in this city. The owner had put in it the service pipes for gas, according to the regulations of the defendants. He applied for gas which was supplied through one meter, placed in the cellar of the house. He also applied for separate meters for each floor, which were not furnished by the defendants, and it would seem because he had not put into the house separate or independent service pipes for each floor to which the meter might be connected.

It does not appear that this application being refused, he took any steps to enforce his demand.

It is conceded that the pipes in the house were sufficient to serve it with gas, and that gas could be carried to all parts of it through them.

The plaintiff when he became an occupant also applied for gas, and the defendants answered by saying that they had already furnished it to the building, and refused to place a meter on the plaintiff's floor unless separate and independent service pipes were provided. The plaintiff's application was not in fact alone for gas, but for a separate meter as well. He wanted the meter, as he stated on the trial, and the question really involved in this controversy is, whether the defendants were bound to furnish it.

The plaintiff sues for a penalty under the sixth section of the act of 1859 (Laws, p. 698), which provides that all gas companies shall supply gas to the owner or occupant of any building or premises, which may be required for lighting it or them, upon a written application therefor to be signed by him. It also provides, that if for the space of ten days after such application, and the deposit of a reasonable sum, as in the act provided (if required), the company shall refuse or neglect to supply gas, they shall pay to the applicant the sum of ten dollars and five dollars for every day thereafter during which such neglect or refusal shall continue.

It will be observed that there is no qualification on the obligation

[1] *Compare:* Express Co. *v.* Cook, 44 Ala. 468; Express Co. *v.* Newby, 36 Ga. 635; Christenson *v.* Express Co., 15 Minn. 270; Express Co. *v.* Backman, 28 Oh. St. 144. — Ed.

imposed by the statute. The gas must be furnished or a penalty is incurred, which continues from day to day, as long as the refusal or neglect to supply it is continued. It will also be observed that the section referred to does not either directly or indirectly require the company to furnish a meter, either to the owner or occupant, for the whole or any part of the premises, and the act is equally silent as to the mode by which the gas shall be conveyed through the houses.

The plaintiff seeks the enforcement of a penalty, and whether the statute be regarded as penal or remedial, and one either to be strictly or liberally construed, his claim is not within its purview. Assuming that he is the occupant of premises within the meaning of the statute, which may well be questioned, and that he had the right to apply for gas, the answer to his demand is, that gas was supplied through the pipes provided by his landlord, which he could use if he chose to do so, and the response disposes of his claim. The owner of the building had exhausted the power to compel the defendants to furnish gas, under section six of the act referred to. They had granted his application for it, although they had declined to furnish separate meters, a neglect or refusal of which to him he alone could take advantage of. The gas having been thus furnished, no penalty was incurred by them, unless the omission to supply a meter to the plaintiff is fairly within the application for gas and included in it.

This cannot be. The meter is employed for the benefit not of the consumer but the company, and cannot be used without tests which the former may insist shall be applied (§ 5). If the company prefer, they may supply the gas without it, for aught that appears in this case. The statute does not require them to furnish it, and that in itself may be sufficient to dispose of this case. If the statute be strictly construed, the defendants are not liable, because they have furnished gas to the building which includes the premises occupied by the plaintiff, and which only they were bound to furnish, and if it be liberally enforced, then the defendants should not be obliged to provide an article which is not required by the letter of the law, nor necessary to the plaintiff for the enjoyment of the light which he desires, nor should such a construction create a duty which under its provisions is not declared.

It must be said in addition, that if it were otherwise considered, that the defendants should not be prohibited from adopting reasonable rules with reference to the introduction of gas, protective of their own interests.

They proved on the trial, that it was not customary to put in separate meters such as demanded by the plaintiff, without separate service pipes, and that they were necessary to prevent "tapping," which would result in a fraud upon their rights. The legislature has by various provisions in the act of 1859 sought to guard them against fraud and theft, and has taken the lead in anticipating violations of fair dealing, against which corporations as well as natural persons are guaranteed

under our laws, the right to protect themselves, even in the discharge of duties imposed upon them.

For these reasons the judgment should be reversed.

LAWRENCE *v.* PULLMAN PALACE CAR CO.

SUPREME COURT OF MASSACHUSETTS, 1887.

[144 *Mass.* 1.][1]

DEVENS, J. The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping car of the defendant, in coming from Baltimore to New York, by the defendant's servants; and that, on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and, incidentally, the other accommodations afforded by the sleeping car. An examination of the contract with the Pennsylvania Railroad Company, by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that, while these cars were to be furnished by the defendant corporation, they were so furnished to be used by the railroad company "for the transportation of passengers;" that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt, from time to time, for the government of its own employees. While, therefore, the defendant company was to collect the fares for the accommodations furnished by its cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the accommodations of these cars, and by what regulation this use of the cars should be governed. The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

The railroad company had classified its trains, fixing the terms upon which persons should become entitled to transportation in the sleeping cars, and the cars in which such transportation would be afforded. It was its regulation that, between Baltimore and New York, this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule,

[1] This case is abridged. — ED.

but, whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was, "that the ordinary train conductors of the Pennsylvania Railroad Company have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing, except" the details of care, &c. The defendant's servant, the plaintiff having entered the sleeping car, informed him that his "split tickets," as they are termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding "through passage tickets, intact, to the point to which sleeping accommodations were desired." The plaintiff was in no way disturbed until the train conductor (who was not the defendant's servant) came into the car, informed the plaintiff that his tickets were not such as to entitle him to purchase the sleeping-car ticket, and several times urged the plaintiff to leave the sleeping car, which the plaintiff refused to do. Whether accommodation was rightly refused to the plaintiff or not in the sleeping car, the refusal was the act of the railroad company's servant, and not of the defendant's, whose duty it was to be guided by the train conductor.

The ejection of the plaintiff was also the act of the railroad company, and not of the defendant. It is the contention of the plaintiff, that, even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a "show of force," after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff rose and yielded thereto. The defendant's conductor took hold of the plaintiff's arm when he rose, and aided the plaintiff in crossing the platform of the cars, but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company; he was assisting the train conductor in the duty he was performing as servant of the railroad company. To conduct him across from one car to another in the manner described by the plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of the defendant's servant was in every way calculated to assist the plaintiff in his transit from one car to another.

Nor is the fact important that the car into which the plaintiff was passed subsequently became cold, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that, when the plaintiff entered the car, it was not in fit condition to receive passengers; and, by the contract, the management of it and the duty of furnishing fuel were entirely with the railroad company, and not with the defendant.

Judgment on the verdict.[1]

[1] Lemon *v.* Palace Car Co., 52 Fed. 262; Nevin *v.* Palace Car Co., 106 Ill. 226; Williams *v.* Palace Car Co., 40 La. Ann. 417. — Ed.

THE PEOPLE *v.* MANHATTAN GAS LIGHT CO.

SUPREME COURT OF NEW YORK, 1865.

[45 *Barb.* 136.]

APPEAL from an order made at a special term, denying an application for a *mandamus* commanding the defendants to supply the plaintiff with gas, at his house, No. 121 West Sixteenth Street, New York.

By the court, INGRAHAM, P. J. I think there can be no doubt about the authority of this court to direct the respondents to furnish gas to persons who, under the provisions of their charter, have a right to receive it and who offer to comply with the general conditions on which the company supply others.

They possess, by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left then to inquire whether the relator was in a condition to demand from the company this supply. It appears by the papers used on the motion that the relator commenced taking gas in 1858, at No. 61 in Seventh Avenue, and was supplied with gas by the company, until 28th of December, 1861. That he paid for the gas so received up to 19th of August, 1861, and that for gas furnished after that date he has not paid. It also appears that in January, 1865, the respondent sued the relator and obtained a judgment against him for the amount due therefor, which still remains unpaid. In May, 1864, the relator applied to the company for gas at 121 West Sixteenth Street, which was furnished to him by the company, without objection on account of the former indebtedness, until 9th of February, 1865, when the company shut off the supply of gas and refused to furnish any more. It also appears that the relator in answer to a claim for payment of this indebtedness, represents himself as insolvent and unable to pay the judgment.

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application. It would be unreasonable to suppose that in every instance they could ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency and his inability to pay for gas furnished previously.

The attempted denial of liability for this bill, by the relator, will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside. So long as that remains in force it is conclusive against him.

The order appealed from should be affirmed, with $10 costs.[1]

[1] *Compare:* Montreal Gas Co. *v.* Cadieux, 1899, A. C. 589; Shiras *v.* Ewing, 48 Kans. 170; Gas Co. *v.* Storage Co., 111 Mich. 401; McDaniel *v.* Waterworks, 48 Mo. 273; Turner *v.* Water Co., 171 Mass. 330; Ins. Co. *v.* Philadelphia, 88 Pa. St. 393; Hotel Co. *v.* Light Co., 3 Wash 316. — ED.

STATE *v.* NEBRASKA TELEPHONE CO.

SUPREME COURT OF NEBRASKA, 1885.

[17 *Neb.* 126.[1]]

REESE, J. This is an original application for a *mandamus* to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice.

It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist.

We cannot see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits, will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney-at-law in Lincoln, Nebraska. That he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska. That this territory is occupied by respondent exclusively, together with a large portion of

[1] This opinion is abridged. — ED.

southwestern Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity — patented as it is — should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone. The value of

such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send despatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from

the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone; "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

A peremptory writ of *mandamus* must be awarded.[1]

STATE *v.* CAMPBELL.

SUPREME COURT OF NEW JERSEY, 1867.

[32 *N. J. Law*, 309.[2]]

THE CHIEF JUSTICE. . . . To make intelligible the application of the law to the case, the circumstances must be understood. They were these: the passenger who was expelled had purchased, at the depot in New York, this ticket, which he produced and showed, for the first time, on the platform at the station at Newark. At the time that he provided himself with it, he expected to have trouble with the conductor, as it was then his intention to insist on his right to use the return ticket, which was spent. Being called on by the conductor, on two several occasions, to show his ticket, he produced the spent one, keeping the other out of view, so that the conductor was not aware of its possession by him, while he remained in the cars. Having arrived at the Newark station, he was informed he must pay his fare or leave the cars. He refused to do either act. The conductor then declared his intention to delay the train until the passenger paid his fare or left the cars, and accordingly he sent back a flag, to warn a train that was nearly due at Newark. This produced excitement; and when the employees of the company were called in, the acquaintances of the recreant passenger collected around him and endeavored to prevent his being put out. The passenger himself resisted by clinging to the seats. After a delay of twelve minutes he was ejected. During this time the other train, which had been warned of the danger, arrived.

It is presumed that no person will deny that here was a transaction which, if often repeated, would deprive railroad travel of some of its security and much of its comfort. The annoyance and danger to be apprehended from such an affair, are too obvious to need exposition. It is clear, therefore, that some person was to blame. That person was certainly not the company or its agents. The company, through its

[1] *Compare:* Smith *v.* Water Works, 104 Ala. 315; Crow *v.* Irrigation Co., 130 Cal. 311; Lloyd *v.* Gas Co., 1 Mackey, 131; Gas Co. *v.* Calliday, 25 Md. 1; Bank *v.* Lowell, 152 Mass. 556; Wood *v.* Auburn, 87 Me. 287; Water Works *v.* State, 46 Neb. 194; Crumley *v.* Water Co., 99 Tenn. 420. — ED.

[2] This opinion is abridged. — ED.

agents, simply enforced a plain legal right in a legal mode. The whole fault must be laid to the passenger; and the only question which can possibly arise is, whether his conduct was such as to justify the conductor in refusing him re-admission into the cars. The proposition is simply this: if a passenger refuses to show his ticket on a legal demand made, and refuses to leave the cars on request, and is put out, after resistance, has he, as a matter of law, the privilege to return to the cars upon the production, at this stage of the occurrence, of his ticket? This proposition must be answered in the affirmative, in order, in this case, to hold that the defendant was guilty of a wrong. In my opinion, such a doctrine is not consistent with either law or good sense. Its establishment would, practically, annul the power of a railroad company to require passengers to show their tickets; for it is obvious, that if the only penalty on a refractory passenger is a momentary expulsion, he will be enabled, at a small sacrifice, by repeated refusals, to compel an abandonment of the demand upon him. A passenger takes his ticket subject to the reasonable regulations of the company; it is an implied condition in his contract, that he will submit to such regulations; and if he wilfully refuses to be bound by them, by so doing he repudiates his contract, and after such repudiation cannot claim any right under it. In this case, the passenger, with full knowledge of the regulation in question, refused to show his ticket, which alone gave him the right to a seat in the cars. The exhibition of the spent ticket did not help the matter; he stands, therefore, on the same footing as any other passenger who, when properly applied to, will not exhibit the evidence of his rightful presence in the car. If this particular passenger had the legal right to re-enter the cars after his tortious refusal, so, on all similar occasions, will all other passengers be entitled to the same right. We come thus to the result, that railroad passengers may violate, with full knowledge, a legal regulation of a company in whose cars they are carried; they may resist, short of a breach of the peace, all attempts to expel them; they may, by this means, at a loss to the company and to the peril of the public, disarrange the order of successive trains upon the road, with regard to each other; they may occasion a tumult and disorder in the car in which they may happen to be; and, after being expelled, they may immediately return to repeat, if so inclined, the same misconduct. I must think it requires no argument to show that such a license to do evil as this does not exist. The defendant was entirely justified in forming the rational conclusion, that the passenger in question, if re-admitted into the cars, would again misconduct himself; and, under such circumstances, it was his duty to exclude him.

The Court of Oyer and Terminer should be advised to set aside the verdict.[1]

[1] *Compare:* Carolina R. R. *v.* Nix, 68 Ga. 572; Louisville R. R. *v.* Breckenridge, 99 Ky. 1; Obrien *v.* Boston R. R., 15 Gray, 20; Pease *v.* Delaware R. R., 101 N. Y. 367; Texas R. R. *v.* James, 82 Tex. 306. — Ed.

PENNINGTON *v.* PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD CO.

SUPREME COURT OF MARYLAND, 1883.

[62 *Md.* 95.[1]]

BRYAN, J., delivered the opinion of the court.

The appellant purchased from a ticket agent of the appellee a ticket of which the following is a copy.

Excursion Return Check.

PHILA. WILM. and BALTO. R. R.

(*One Continuous Passage.*)

PERRYMAN'S to BALTIMORE.

In consideration of the reduced rate at which the ticket is sold, it is agreed that it shall be used within three days, including the day of sale, for a continuous trip only, and by such trains as stop regularly at the station, and by its acceptance the purchaser becomes a party to and binds himself to a compliance with these conditions.

(1,723) GEO. A. DADMUN,
General Ticket Agent.

On the back of the above ticket is the following stamp, to wit:

Phila. Wilm. and Balto. R. R.
Dec. 13, 1882.
Baltimore.

7 v. 62.

He proceeded in appellee's cars to Perryman's on the thirteenth day of December, 1881, and while attempting to return on the sixteenth day of December, the conductor refused to receive the ticket for his passage and required him to leave the cars. The controversy depends upon the rights acquired by the purchase of the ticket. The plaintiff, at the trial below, offered to prove that before he purchased the ticket, he was informed by the agent, upon inquiry from him, that it was "good until used."

We think that the plaintiff's rights in this regard are limited by the ticket. There is no evidence in the record that the ticket agent was authorized to make any contracts for the railroad company, or that he had any duties beyond the sale and delivery of the tickets. The ticket purchased by the appellant clearly informed him that he would have no right to use it after the fifteenth, and the agent had no authority to vary its terms.

A passenger has a right to be conveyed in the cars of a railroad company without making any special contract for transportation. Upon payment of the usual fare, the company is bound to convey him, and is under all the obligations imposed by law on common carriers, so far as they relate to the transportation of him as a passenger. It is competent to vary these obligations by a special agreement, on valu-

[1] Opinion only is printed. — ED.

able consideration, between the passenger and the company. But if the passenger chooses to do so, he may stand on his legal rights, and elect to be carried to his destination without making any special contract. The mere purchase of a ticket does not constitute a contract. Before the ordinary liability of the railroad company can be varied, there must be a consent of the passenger, founded on valuable consideration. The ticket ordinarily is only a token, showing that the passenger has paid his fare. But where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. It is true, he pays his fare before he receives the ticket, but if he has been misled or misinformed by the seller of the ticket, as to its terms, he has a right to return the ticket and receive back his money. The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of his ticket; if he agrees to those terms the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made.

In this case the plaintiff made the journey to Perryman's, under the terms mentioned in the ticket. There was evidence that he did not read the ticket. He used it and thereby availed himself of the advantage conferred by the diminished rates. He had an ample opportunity to read it if he had chosen to do so. He could not, on any principle, hold the railroad company to any terms except those stated. If there was a contract, these terms were embraced in it, if there was no contract, he had no right to the reduction in the fare. After availing himself of this reduction, it was too late for him to allege that he did not know on what terms the reduction was made; when he had an ample opportunity of learning them from the ticket in his possession.

The plaintiff was required to leave the cars at Back River Station, on his journey back to Baltimore from Perryman's. After he had left the cars and while on the platform he offered to pay the conductor his fare from that station to Baltimore, but the conductor refused to give him admission to the cars. The plaintiff had already accomplished a portion of the return journey to Baltimore without paying his fare. He clearly was not entitled to be conveyed from Perryman's to Baltimore without paying fare for the whole distance. If he had been carried from Back River Station to Baltimore, on payment of the fare only from that place, he would have escaped payment of a portion of the fare; and so, in fact, he would have accomplished the return trip at a reduced rate. The company was under no obligation to carry him for less than the full rate for the whole distance, and so he was properly excluded from the cars. The judgment must be affirmed.

Judgment affirmed.[1]

[1] *Compare:* Manning *v.* Louisville R. R., 95 Ala. 392; Stone *v.* Chicago R. R., 47 Ia. 82; Davis *v.* Kansas City R. R., 53 Mo. 317; Texas Pacific R. R. *v.* Bond, 62 Tex. 442. — Ed.

McDUFFEE *v.* PORTLAND AND ROCHESTER RAILROAD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1873.

[52 *N. H.* 430.]

CASE, by Daniel McDuffee against the Portland & Rochester Railroad, for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road, between Rochester, N. H., and Portland, Me., reasonably equal to those furnished by the defendants to the Eastern Express Company.

The defendants demurred to the declaration.[1]

DOE, J. I. A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. Sandford *v.* R. Co., 24 Pa. St. 378, 381; N. J. S. N. Co. *v.* Merchants' Bank, 6 How. 344, 382; Shelden *v.* Robinson, 7 N. H. 157, 163, 164; Gray *v.* Jackson, 51 N. H. 9, 10; Ansell *v.* Waterhouse, 2 Chitty, 1, 4; Hollister *v.* Nowlen, 19 Wend. 234, 239. He is under a legal obligation: others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. "There are certain cases in which, if individuals dedicate their personal services, or the temporary use of their property, to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation." Olcott *v.* Banfill, 4 N. H. 537, 546. "He [the common carrier] holds a sort of official relation to the public. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. He cannot refuse to carry a proper article, tendered to him at a suitable time and place, on the offer of the usual reasonable compensation. Story on Bailments, sec. 508; Riley *v.* Horne, 5 Bing. 217, 224; Bennett *v.* Dutton, 10 N. H. 486. When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his place, as they are defined and fixed by law." Moses *v.* B. & M. R. R., 24 N. H. 71, 88, 89. On this ground it was held, in that case, that a common carrier could not, by a public notice, discharge himself from the legal responsibility pertaining to his office, or from performing his public duty in the way and on the terms prescribed by law.

"The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application." N. E. Express Co. *v.* M. C. R. R. Co., 57 Me. 188, 196. A common

[1] Arguments of counsel are omitted. — ED.

carrier of passengers cannot exercise an unreasonable discrimination in carrying one and refusing to carry another. Bennett *v.* Dutton, 10 N. H. 481. A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such a power, he would be a carrier, — a special, private carrier, — but not a common, public one. From the public service — which he entered of his own accord — he may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but, as long as he remains in the service, he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the State are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and, in the department now under consideration, ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the State. A right of conveyance, unreasonably and injuriously preferred and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant, before embarking in that business. The profit could not be considered without taking the duty into account, for the rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that if no profit should accrue, the performance of the duty would be none the less obligatory until he should be discharged from the public service. Taylor *v.* Railway, 48 N. H. 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill, and capital to the service of the country. Profitable or unprofitable, his condition is that of one held to service, having by his own act, of his own free will, submitted himself to that condition, and not having liberated himself, nor been released, from it.

A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry. On what legal ground can

he exercise such discrimination indirectly? He cannot, without good reason, while carrying A, unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A and his goods, provide such disagreeable ones for B that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle, guaranteeing the common right against direct attack, sanctions its destruction by a circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together nor one alone can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character, — the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination,

and parcelled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practised by a carrier held to the common service is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if for that service the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality or in some other particular. A service or price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law.

The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general prin-

ciple of reasonable equality which distinguishes the duty of a common carrier in the legal sense from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and therefore not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were there unreasonably and negligently exposed by the carrier to the society of small-pox patients. Sober, quiet, moral, and sensitive travellers may have cause to complain of their accommodations if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations. 2 Greenl. Ev. sec. 222 *a*; Bennett *v.* Dutton, 10 N. H. 481, 486. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and if the injury is caused by unreasonableness of facilities or accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right, and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.

This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as

his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is one hundred dollars, and his just profit, not needed in his business, is one tenth of that sum, he has ten dollars which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty to whom transportation is one of the necessaries of life, and who suffer for lack of it. But if he charges the ten dollars to those who pay him for their transportation, if he charges them one hundred and ten dollars for one hundred dollars' worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburses himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed, — whether it was his, or one forced by him from others, including the party complaining of it. But it will not be necessary to consider this point further until there is some reason to believe that what the plaintiff complains of is defended as an act of disinterested benevolence performed by the railroad at its own expense.

In Garton *v.* B. & E. R. Co., 1 B. & S. 112, 154, 165, when it was not found that any unreasonable inequality had been made by the defendants to the detriment of the plaintiffs, it was held that a reasonable price paid by them was not made unreasonable by a less price paid by others, — a proposition sufficiently plain, and expressed by CROMPTON, J., in another form, when he said to the plaintiffs' counsel during the argument of that case: "The charging another person too little is not charging you too much." The proposition takes it for granted that it has been settled that the price paid by the party complaining was reasonable, — a conclusion that settles the whole controversy as to that price. But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity, or an unreasonable discrimi-

nation and a violation of the common right. Charging A less than B for the same service, or service of the same value, is not of itself necessarily charging A too little, or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or by being made the victim of an unjustifiable discrimination. The doctrine of reasonableness is not to be overturned by a conclusive presumption that every inequality of price is the work of alms-giving, dictated by a motive of humanity. If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it.

In some cases, this may be an inquiry of some difficulty in each of its branches. But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial cannot be taken; a narrow test of right and wrong that would be grossly inequitable cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the doctrine of justice, it is for him to show the grounds of his discontent.

The decision in N. E. Express Co. *v.* M. C. R. Co., 57 Me. 188, satisfactorily disposed of the argument, vigorously and ably pressed by the defendants in that case, that a railroad, carrying one expressman and his freight on passenger trains, on certain reasonable conditions, but under an agreement not to perform a like service for others, does not thereby hold itself out as a common carrier of expressmen and their freight on passenger trains, on similar conditions. So far as the common right of mere transportation is concerned, and without reference to the peculiar liability of a common carrier of goods as an insurer, such an arrangement would, necessarily and without hesitation, be found, by the court or the jury, to be an evasion. A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by

a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common-law right, the question might arise whether, under our statute law (Gen. Stats. chs. 145, 146, 149, 150), public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.

The public would seem to have reason to claim that the clause of Gen. Stats. ch. 146, sec. 1, — "Railroads being designed for the public accommodation, like other highways, are public," — is a very comprehensive provision; that public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference) so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken; and that, in a country professing to base its institutions on the natural equality of men in respect to legal rights and remedies, it cannot be presumed that the legislature intended, in the charter of a common carrier, to grant an implied power to create monopolies in the express business, or in any other business, by undue and unreasonable discriminations. There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms. And, if such power were attempted to be conferred, there would be, in this State, a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law. But, resting the decision of this case, as we do, on the simple, elementary, and unrepealed principle of the common law, equally applicable to individuals and corporations, we have no occasion, at present, to go into these other inquiries.

Case discharged.[1]

[1] *Compare:* Pickford *v.* G. J. Ry., 10 M. & W. 397; Parker *v.* G. W. Ry., 7 M. & G. 253; Parker *v.* G. W. Ry., 11 C. B. 545; Sandford *v.* R. R., 24 Pa. 378; New Eng. Exp. Co. *v.* R. R., 57 Me. 188. — Ed.

THE EXPRESS CASES.

Supreme Court of the United States, 1886.

[117 *U. S.* 1.]

Mr. Chief Justice Waite delivered the opinion of the court.[1]

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. . . . The evidence shows that the express business was first organized in the United States about the year 1839. . . . It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company of some form of legal constitution. Every railway

[1] Part of the opinion is omitted. — Ed.

company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted. . . .

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently

the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influ-

ential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles, the American two hundred roads, with a mileage of 28,000 miles, and the Southern ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business, they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when

offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas, and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when

they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fé Railroad Co.* v. *Denver & New Orleans Railroad Co.*, 110 U. S. 667, followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pacific Railway Co.*, 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

Mr. Justice Miller dissenting.

When these cases were argued before Circuit Judge McCrary and myself at St. Louis, after due consideration and consultation with him and Judge Treat, of the District Court, I announced certain propositions as the foundations on which the decrees should be rendered. These were afterwards entered in the various circuits to which the cases properly belonged, and, I believe, in strict accordance with the principles thus announced.

I am still of opinion that those principles are sound, and I repeat them here as the reasons of my dissent from the judgment of the court now pronounced in these cases.

They met the approval of Judge McCrary when they were submitted to his consideration. They were filed in the court in the following language:

"1. I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

"That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

"3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill, and diligence on the part of the railroad company.

"4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

"5. I am of the opinion that it is the duty of every railroad com-

pany to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

"If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

"6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

"7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered to ascertain the reasonable compensation and compel its payment.

"9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

"10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount paid. And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

"11. When no such arrangement has heretofore been in existence it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

"12. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the right of the express companies."

Three years' reflection and the renewed and able argument in this court have not changed my belief in the soundness of these principles.

That there may be slight errors in the details of the decrees of the Circuit Courts made to secure just compensation for the services of the railroad companies is possibly true, but I have not discovered them, and the attention of the court has not been given to them in deciding this case; for holding, as it does, that the complainants were entitled to no relief whatever, it became unnecessary to consider the details of the decrees.

I only desire to add one or two observations in regard to matters found in the opinion of this court.

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character and not judicial.

As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then in the absence of any legislative rule fixing their compensation I maintain that that compensation is a judicial question.

It is, then, the ordinary and ever-recurring question on a *quantum meruit*. The railroad company renders the service which, by the law of its organization, it is bound to render. The express company refuses to pay for this the price which the railroad company demands, because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt.

That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it, when it becomes matter of controversy.

The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced, no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half-century ago, before Harnden established his local express between the large Atlantic cities; for, let it be remem-

bered that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances.

I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

Mr. Justice Field dissenting.

I agree with Mr. Justice Miller in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

Mr. Justice Matthews took no part in the decision of these cases.[1]

OLD COLONY RAILROAD *v.* TRIPP.

Supreme Judicial Court of Massachusetts, 1888.

[147 *Mass.* 35; 17 *N. E.* 89.]

W. Allen, J., delivered the opinion of the court.

Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers; it is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the sta-

[1] *Acc.* Pfister *v.* R. R., 70 Cal. 169; Louisville, &c. Ry. *v.* Keefer, 146 Ind 21; 44 N. E. 796; Sargent *v.* R. R., 115 Mass. 416; Exp. Co. *v.* R. R., 111 N. C. 463; 16 S. E. 393. — Ed.

tion, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Stat. chap. 112, § 188; Fitchburg Railroad *v.* Gage, 12 Gray, 393; Spofford *v.* Boston & Maine Railroad, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station, where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger, which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all; and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers is Markham *v.* Brown, 8 N. H. 523, in which it was held that an innholder had no right to exclude from his inn a stagedriver who entered it to solicit guests to patronize his stage in opposition to a driver of a rival line who had been admitted

for a like purpose. It was said to rest upon the right of the passengers rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. Barney *v.* Oyster Bay H. Steamboat Co. 67 N. Y. 301, and Jencks *v.* Coleman, 2 Sumn. 221, are cases directly in point. See also Com. *v.* Power, 7 Met. 596, and Harris *v.* Stevens, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff, which the plaintiff gave to Porter & Sons. The plaintiff made a contract with Porter & Sons to do all the service required by incoming passengers, in receiving from the plaintiff, and delivering in the town, baggage and merchandise brought by them; and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Pub. Stats. chap. 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in § 191 for violations of the statute. The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depot, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers, and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station-grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depot for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English Railway & Canal Traffic Act, 17 & 18 Vict. chap. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." Marriott *v.* London & S. W. R. Co. 1 C. B. N. S. 499, was under this statute. The complaint was that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses, which brought passengers, were admitted. An injunction was ordered. Beadell *v.* Eastern Counties R. Co. 2 C. B. N. S. 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station, to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's was that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also Painter *v.* London, B. & S. C. R. Co. 2 C. B. N. S. 702; Barker *v.* Midland R. Co. 18 C. B. 46. Besides Marriott's Case, *supra*, Palmer *v.* London, B. & S. C. R. Co. L. R. 6 C. P. 194, and Parkinson *v.* Great Western R. Co. L. R. 6 C. P. 554, are cases in which injunctions were granted under the statute: in the former case, for refusing to admit vans containing goods to the station-yard for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum, in England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers; or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station-grounds and buildings.

A majority of the court are of the opinion that there should be —

Judgment on the verdict[1]

[1] *Acc.* Brown *v.* N. Y. C. & H. R. R. R., 27 N. Y. Sup. 62. — Ed.

FIELD, J.[1] The Chief Justice, Mr. Justice DEVENS, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. . . .

The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins. As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers as well as private carriers actually employed by passengers or by the owners or consignees of merchandise. Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the Commonwealth, and, in connection with railroads, often form a continuous line of transportation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connected with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad, and it can probably prohibit all persons from soliciting business for themselves on its premises. Whatever may be its right to exclude all common carriers of passengers or of merchandise from its depot and grounds, who have not an order to enter, given by persons who are, or who intend to become, passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line and to establish a monopoly not granted by its charter which might be solely for its own benefit and not for the benefit of the public. Such a regulation does not give "to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds," in the transportation of persons and property. See Parkinson *v.* Great Western R. Co., L. R. 6 C. P. 554; Palmer *v.* London, B. & S. C. R. Co. Id.

[1] Part of this opinion is omitted. — ED.

194; New England Express Co. *v.* Maine Central R. Co. 57 Me. 188. . . .

It is undoubtedly a convenience to passengers on a railroad, that common carriers of passengers, or of baggage and other merchandise, should be in waiting on the arrival of trains at a station, although no order requiring the attendance of such carriers has been previously given.

While the statute requiring a railroad corporation to give to all persons and companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds must, from the nature of the subject, be so construed as to permit the corporation to make such reasonable regulations as are necessary to enable it to perform, without inconvenience, its duties as a common carrier, and such as the size and condition of its depot and other buildings and grounds require, yet the facts stated in the report cannot be held sufficient to warrant the plaintiff in admitting one company of expressmen to, and in excluding all others from, the advantages of bringing express wagons within its grounds, and of accepting or of soliciting employment as a common carrier of baggage from the passengers arriving at its depot. The report does not show that any inconvenience to the railroad company, or to the public using the railroad, was occasioned by the defendant entering the grounds of the company for the purpose of soliciting employment as a common carrier of baggage. Upon the facts, as they appear in the report, it cannot be said that, within any reasonable construction of the statute, reasonable and equal facilities were granted to the defendant and to Porter & Sons; or that any necessity existed for giving a preference to the latter.

GRISWOLD *v.* WEBB.

SUPREME COURT OF RHODE ISLAND, 1889.

[16 *R. I.* 649: 19 *Atl.* 143.]

STINESS, J. The plaintiff is owner of Commercial Wharf, in Newport, a part of which is leased to the Newport & Wickford Railroad & Steam-Boat Company as a terminus. To preserve order upon the wharf, stands are let for hackney carriages, and the following rules are prescribed for its use: "Rules for Hackmen and Others. (1) Drivers of hackney carriages shall remain on or near their carriages, except when carrying baggage to or from them. (2) No one shall occupy a hack-stand or express-stand except the licensee or his employes. (3) No hackney carriage or express wagon shall stand on the space to the eastward of the restaurant building, or on the road-ways, except on licensed hack-stands, even though ordered in advance by a passenger." East of the restaurant building is a

plank walk for passengers, and east of the walk a space is reserved for private carriages. The rest of the wharf is used for sidewalks, road-ways, and buildings. The defendant, driver of a hackney carriage in Newport, went to the wharf, on the day in question, for a lady who was to arrive in the boat, as he had been ordered to do by the passenger, or some one in her behalf. He backed his hack as near as he could to the space reserved for private carriages, when he was ordered to leave the wharf by the superintendent, upon the ground that he had no right to be there, having no license from the owner. The plaintiff claimed that the wheels of the defendant's carriage were backed on to the plank walk, but, upon all the testimony, we are not satisfied this was so, or, if so, that it was anything more than accidental. At any rate, the order to leave the wharf was not put upon this ground, but because he had no right there. Upon receiving the order to leave, the defendant stated, both to the plaintiff and to the superintendent of the wharf, that he had been ordered there for a passenger, and he refused to leave. The plaintiff then called a policeman, who moved the carriage to another place in the road-way, where the defendant remained until the boat arrived, when he took his passenger and drove away. The passenger was an infirm lady, who had been accustomed to ride with the defendant, and one who was obliged to use a stool, which he had with him, to aid her in getting into the carriage. The plaintiff sues in trespass, and the defendant justifies under a right as servant of the passenger. The question is whether the defendant had the right to enter and remain upon the wharf to take the passenger, notwithstanding the rules and the order to leave. We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all; for none are allowed to stand in the road-ways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf.

The question of right, therefore, is the same as it would be between passengers and a company which owns its terminus. While such ownership carries with it a right of control, in most respects the same as in private property, a railroad station or steam-boat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travellers, and so to say that none, except those whom it permits, shall solicit in the business of hacking or expressing. When notice of such prohibition has been given, the license which otherwise might be implied

is at an end, and it is the duty of persons engaged in any such business to heed the notice and to retire from the premises. Barney *v.* Steam-Boat Co., 67 N. Y. 301; Com. *v.* Power, 7 Met. 596.

But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveller, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is, *pro hac vice*, a private carriage; not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not "standing for hire." Masterson *v.* Short, 33 How. Pr. 481. The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from a station or wharf, it is immaterial whether he goes in a private or a hired carriage. Decisions upon this question have not been numerous, and we know of but one directly in point, although in others there are *dicta* which indicate what is understood to be the law. Summitt *v.* State, 8 Lea, 413, was a conviction of the defendant, a watchman in a depot, for assault in ejecting a hackman therefrom. The company had forbidden hackmen to enter the building. Notwithstanding this rule, the right of a hackman to go into a part of the depot to obtain the baggage of a passenger, whose check he had, was not controverted. The prosecutor, having the check of a passenger, was in another part of the depot; but it was held that the defendant was not justified in ejecting him altogether from the station, and the conviction was sustained. Tobin *v.* Railroad Co., 59 Me. 183, was an action for damages by a hackman who was injured by stepping on a defective platform when leaving a passenger at the station. The court say: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting." In this case it was not claimed that any rules had been violated. The recent case of Railroad Co. *v.* Tripp, 147 Mass. 35, was an action of trespass against an expressman who solicited patronage in the plaintiff's station, contrary to its rules. W. Allen, J., says: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or bag-

gage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it." A statute of Massachusetts prescribes that railroad corporations shall give to all persons equal facilities for the use of its depot. The court held that this statute applied only to the relations between common carriers and their patrons, or those who had the right to use the station. It did not give the defendant the right to go there to solicit business because another had the right. See, also, Harris *v.* Stevens, 31 Vt. 79. In Markham *v.* Brown, 8 N. H. 523, an action of trespass, brought by an innkeeper against a stage driver, the court say the defendant had clearly a right "to go to the plaintiff's inn with travellers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare." The case most nearly in support of the plaintiff's contention of those we have seen is Barker *v.* Railroad Co., 18 C. B. 46, where it was held that an omnibus proprietor, carrying passengers to and from a station, could not maintain an action for a refusal to allow him to drive his vehicle into the station yard. As the proprietor was not using or seeking to use the railway, it was considered that the company owed him no duty. JERVIS, C. J., said a passenger would, no doubt, have a right of action, if unduly obstructed, but a violation of duty to him would not give an action to the plaintiff. It is to be observed that the recent English cases are mainly controlled by statute (17 & 18 Vict. c. 31), to which the Massachusetts statute is similar. They relate chiefly to the question whether a prohibition to one, to ply for passengers within a station, when the same right is granted to another, is an undue preference, under the statute. It is generally held that it is not. See In re Beadell, 2 C. B. (N. S.) 509; In re Painter, Id. 702; Hole *v.* Digby, 27 Wkly. Rep. 884. In the latter case it seems to be conceded that one going, *bona fide*, to meet a passenger, would not be guilty of trespass. In re Marriott, 1 C. B. (N. S.) 499, the defendant company was ordered to admit the complainant's omnibus into the station to receive and set down passengers and goods, as other public vehicles were admitted. Upon the question before us, we do not think these cases are in conflict with the views we have above expressed. The case at bar differs from Barker *v.* Railroad Co., *supra*, in this: that here the hackney driver is not plaintiff, seeking to recover damages for the revocation of a license to go upon the wharf, or for a breach of duty to another, but the defendant against an alleged trespass, who relied upon his right as servant of the other to justify his being there. We think the justification is sufficient. It is substantially given by the terms of the lease to the steam-boat company. This does not deprive the owner of the general

control of his wharf, nor interfere with his reasonable rules for its management. It simply secures to a passenger the common privilege of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting, *bona fide*, as the servant of such passenger. This qualification guards the owner from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit. We give judgment for the defendant for his costs.[1]

[1] *Acc.* Indian River S. B. Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480; McConnell *v.* Pedigo, 92 Ky. 465, 18 S. W. 15; Kalamazoo Hack & Bus Co. *v.* Sootsma, 84 Mich 194, 47 N. W. 667; Cravens *v.* Rodgers, 101 Mo. 247, 14 S. W. 106; State *v.* Reed, 76 Miss. 211. — Ed.

KATES *v.* ATLANTA BAGGAGE AND CAB CO.

SUPREME COURT OF GEORGIA, 1899.

[107 *Ga.* 636.[1]]

LITTLE, J. . . . The evidence was in direct conflict on many points. As to the truth of the allegations about which the evidence is conflicting, it is, so far as we are concerned, settled by the determination of the judge, and the right of the petitioner to have the judgment refusing the injunction reversed must depend on the application of legal principles to such of the allegations as are not contested by evidence, and these are: First, that the defendants permit the cab company to enter the passenger-trains before reaching the city, for the purpose of soliciting baggage, and refuse the same privilege to the petitioner. Second, that the servants of the cab company are allowed access to the passenger-station for the purpose of soliciting patronage and for more conveniently attending to its business, and this privilege is refused to petitioner. Third, that the privilege of using an office in the baggage-room of the defendants for the transaction of its business is granted to the cab company and refused to Kates. Fourth, the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery of the baggage at the passenger-station; each of which privileges is refused to petitioner. It cannot successfully be maintained that the grant of these privileges to the cab company is in violation of law, nor do the concessions of themselves create a monopoly, nor are they in any sense an interference with the right of the travelling public. On the contrary, it will be recognized that the exercise of the facilities named tends to the public convenience and the prompt and safe handling of the baggage of the passenger. Under no view of the case would the petitioner be entitled to the aid of the courts in restricting these conveniences and lessening the facilities for the safe and convenient handling of the effects of a passenger. The law would hardly undertake to declare that a railroad company should not, if it so desired, through its representative deliver to one at his home in the city of Atlanta a check insuring the delivery of his trunk in the city of New York for which he was bound, and subject the passenger to the inconvenience of personally appearing at the baggage-room, pointing out his trunk, and there receiving the railroad company's check. We know of no obligation which requires that a railroad company shall furnish such a facility, but certainly there can be no reason to forbid its doing so, if it will; and likewise the privilege afforded to an incoming passenger before arrival to deliver to a responsible person the check for his baggage, with an obligation on the part of the latter to deliver the same at the residence or hotel of the passenger, infringes nobody's rights, but does promote the convenience of the travelling public; and rather than forbid, the law's administrators will encourage

[1] This case is abridged. — ED.

such a facility. It is not the right of the plaintiff in error, by injunction or otherwise, to take away or disturb any reasonable means tending to promote the convenience and comfort of the public. The merit of his complaint, if any exists, must be found in the fact of the refusal of the defendants to grant to him the opportunities so to serve the public and thereby better his business. Whether the refusal so to do is proper or unlawful does not depend upon the favor or inclination of the railroad company, but upon the plaintiff's right. If it should depend upon favor, then the plaintiff in error has no cause of complaint, because favor is essentially free and voluntary, and may not be demanded; and it is in this view that we come to measure by the legal standard what are the rights of the petitioner under the allegations he makes, as against the rights of the defendants to control property to which they have title and consequently the right of use, and the plaintiff in error, to succeed, must establish the proposition that the defendants as common carriers are in law bound to afford to him the same conveniences and facilities for carrying on his business which they afford to others engaged in the same calling.

It is claimed that the grant of the enumerated privileges to the cab company, and the refusal of them to petitioner, is the exercise of an undue preference on the part of the carrier against the business of petitioner, and that such grant and refusal establishes a monopoly which is forbidden by law. In entering into the consideration of these important questions, we find that the field of inquiry has been frequently traversed, with the result of adjudicated cases not entirely in harmony. In some of these, the decisions are based on the common law; in very many more, on the terms of various statutes; and it may be well to inquire whether our own organic or statute law deals particularly with such questions. It is undeniably true that the whole spirit of our constitution and laws is directed against any restriction of competition. Constitution of Ga., art. 4, section 2, par. 4. Section 2,214 of the Civil Code declares against discrimination in rates of freight and in the furnishing of facilities for interchange of freights, &c., as do also sections 2,188, 2,307, 2,268, and 2,274 of the Civil Code, in a greater or less degree. While it is perhaps true that there are no express rules of any of our statutes which enact penalties for unjust discrimination exercised by carriers to the detriment of the business of another, yet the scope and intent of the provisions to which we have referred are broad enough to afford a remedy. But in the absence of any statutory declaration, we are remitted to the principles of the common law to determine whether the refusal to grant the plaintiff in error the exercise of the facilities afforded to another in the same business is an unjust discrimination, or an unequal and illegal preference. The defendant railroad companies are common carriers and are under obligation to serve the public equally and justly. Having accepted their right of existence from the public, they owe a duty to the public, and their conduct must be equal and just to all. The

very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences. It implies indifference as to whom he may serve and an equal readiness to serve all who may apply in the order of their application. 57 Me. 188. From these characteristics, which apply to all common carriers, it is a sound legal principle that a railway company as a common carrier cannot grant to any person or persons, or to any part of the public, rights or privileges which it refuses to others, but must treat all alike. Receiving and discharging baggage is one of the duties of a public passenger-carrier, and the obligations before enumerated apply in full force in the receipt and discharge of baggage at the union passenger-station in the city of Atlanta; and if it should be found to be true that the defendant railroad companies, either in the receipt or delivery of baggage by their baggage-master or other agents, discriminated against any passenger or the agent of any passenger in the time or manner in which baggage was received or discharged either through a system of claim-checks or otherwise, such discrimination would be a palpable violation of their public duties, for which the law affords ample remedy by injunction and full redress in the nature of damages. So of injury to or undue interference with the baggage presented. Neither should discourteous language or personal ill-treatment by the agents of the carrier in the performance of his business be tolerated. As these charges were denied, and the judgment sought to be reversed necessarily included a finding against their truth, nothing more than a recognition of the principle need now be adverted to; but, inseparably connected with the transaction of its public business, a common carrier is invested with the ownership of property, for the safe and efficient exercise of the franchises which the public has for its own benefit given to it. Railroad companies have rights of way, stations, depots, cars, engines, &c., as their equipment to serve the public. In the use of such property as public carriers, no one of the public ought to be favored more than another, nor is it lawful to impose any restriction, or make any discrimination in such use, against any one, which does not apply to all; but this rule of impartiality applies to railroad companies in their public capacity, and it by no means follows that such reasonable rules and regulations which a carrier may make for the protection of its property, for the safety and convenience of its passengers or freights, are subject to the same unqualified condition.

This court in the case of Fluker *v.* Georgia R. R. Co., 81 Ga. 461, recognized the distinction which exists between the duty which a railroad company owes to the public and the private right to regulate and control its property. In that case the railroad company had leased to one individual the right of serving lunches to passengers on its trains at a given place. Another claimed the right to exercise the same privilege, which the company denied, and the claimant was expelled as an intruder. As in our opinion this case goes very far in determining the legal questions now presented, we freely refer to the opinion rendered by Chief Justice Bleckley as sound in principle, and authority

binding upon us. Through him the court says: "It is contended that the company has no such exclusive dominion over the tracks and spaces embraced in its right of way as to entitle it to exclude therefrom any person entering thereon in an orderly manner and upon lawful business; and especially that it cannot discriminate against one person and in favor of another. We have discovered no authority for this position, either in its more limited or more extended form. On the contrary, it would seem that the very nature of property involves a right to exclusive dominion over it in the owner. We cannot believe that there is a sort of right of common lodged in the public at large to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make enclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers or with persons other than the companies themselves. . . . The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must depend upon the company for the privilege." Citing 67 N. Y. 301; 31 Ark. 50; 2 Gray, 577; 88 Penn. St. 424; 128 Mass. 5; 29 Ohio St. 364. This is the exposition of the law in force in this State, from which, as we believe, there has been no departure. If the principles declared are applicable to the facts of the present record, it would seem that the contention of the plaintiff that he should be allowed, as a matter of right, access to the depot-grounds and trains of the defendant railroad companies to ply his business, must fail. The case clearly rules the principle that a railroad company has the right to exclude from its premises persons going thereon for the purpose of transacting private business; and a second proposition is equally as clearly stated to be, that the privilege of doing so may be granted to one and refused to another without violating any principle of law which governs the conduct of carriers and regulates their duty to the public.

PEOPLE EX REL. POSTAL TELEGRAPH CO. *v.* HUDSON RIVER TELEPHONE CO.

SUPREME COURT, NEW YORK, 1887.

[19 *Abb. N. C.* 466.[1]]

PARKER, J. The relator is engaged in the transmission of messages by telegraph; the defendant, in the transmission of human speech by

[1] Opinion only is printed. — ED.

means of the telephone. In addition, both relator and defendant carry on a general messenger business in the city of Albany, and each are duly organized under and by virtue of statutes of this State.

By the moving papers it appears that the relator demanded of the defendant that one of its telephones be placed in the office of The Postal Telegraph Cable Company, and at the same time offered to pay any sum required for the privilege of having and using such telephone, and further promised to "comply with all the rules and regulations, regulating and controlling all persons, corporations, and companies having or using said telephone," and that the defendant refused, and still refuses, to comply with such demand.

Thereupon the relator moved the court for a peremptory *mandamus* directing the defendant, on payment to it, by relator, of its usual charges and compliance with its proper regulations, to place one of its telephones in relator's office.

The owner of a patent has the right to determine whether or not any use shall be made of his invention, and, if any, what such use shall be. When however he determines upon its use, his legal duty to the public requires that all persons shall, in respect to it, be treated alike, without injurious discrimination as to rates or conditions. A common carrier is bound to carry all articles within the line of its business, for all persons upon the terms usually imposed. Bank *v.* Adams Express Co., 1 Flippin (S. C.) 242. When a railroad company establishes commutation rates for a given locality, it has no right to refuse to sell a commutation ticket to a particular individual of such locality. Atwater *v.* Delaware, Lackawanna R. R., 4 East. Rep. 186. A gas company must furnish gas at the same rates to all consumers who apply and are ready and willing to pay therefor. Shepard *v.* Milwaukee, 6 Wis. 539; People *ex rel.* Kennedy *v.* Manhattan Gas Co., 45 Barb. 136. And a telephone company is not permitted to withhold facilities for the transaction of business from one class of citizens which it accords to others. State *ex rel.* American U. T. Co. *v.* Bell T. Co., 11 Cent. L. J. 359.

The authorities cited establish the principle that a public servant, as the defendant is, cannot so use the invention protected by the government, as to withhold from one citizen the advantages which it accords to another; and it follows that the relator in this case on compliance with the usual terms, and reasonable regulations of the defendant, is entitled to have *mandamus* issue directing the placing of one of its telephones in relator's office.

The defendant's papers contain a copy of the agreement which it requires its subscribers to sign before giving to them a telephone for use, such agreement containing the rules and regulations which the defendant has determined must form a condition precedent to the placing or using of one of its telephones.

Upon the argument, relator's counsel contended that a portion thereof was unreasonable, and that to comply therewith would sub-

stantially deprive his client from receiving any benefit to its business by the use of the telephone.

The clauses in the agreement to which objection was made were: First. "They are not to be used for . . . any part of the work of collecting, transmitting, or delivering any message in respect of which any toll has been or is to be paid to any party other than the Exchange. Second. Nor for calling messengers except from the Central Office."

As to the first: Both parties are engaged in the attempt to extend their business to the utmost possible limit. They are alike interested in securing as many customers as possible for their respective lines, and to a considerable extent they are competitors in the same territory for the business of transmitting messages.

Now, while the rule is well settled that a common carrier must serve the public impartially, still it must be borne in mind that its duty is to the public, and not to other and competing common carriers. One common carrier cannot demand, as a right, that it be permitted to use a rival common carrier's property for the benefit of its own business. Express Cases, 117 U. S. 1; Jencks *v.* Coleman, 2 Sumner, 221; Barry *v.* O. B. H. Steamboat Co., 67 N. Y. 301.

The relator in this case, however, contends that the statute, under which the defendant was incorporated, makes it the duty of the defendant to permit such use of its telephone as the relator's business requires.

The statute, among other things, provides that "it shall be the duty of the owner or the association owning any telegraph line doing business within this State, to receive despatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals, for transmitting despatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith."

It is clear that the provision quoted makes it the duty of the defendant to transmit over its wires, any and all messages which the relator may desire to have transmitted, on payment of their usual charges to individuals. It seems equally clear that it was not intended to and does not, authorize the relator to transmit its own messages over defendant's wires, on payment of the merely nominal sum required of its ordinary subscribers.

Such a rule would result unjustly to the defendant, as it would enable the relator to enter into competition with defendant in the transmission of messages over its own wires. With equal propriety it could demand that it be connected with the wires of the Western Union Telegraph Company, on payment of a proper charge, and that then it be permitted to use in its own way, and at its own convenience, the wires and property of its competitor for its business.

Such a construction as the relator contends for is not in accordance with either the letter or spirit of the statute. What the statute commands of corporations doing business in this State is, that they shall

send any message presented by another telegraph company, for that purpose, on payment of the proper and usual charges. Should defendant refuse at any time to send a message presented by the relator for that purpose, the law affords an adequate remedy for the violation of the statute. No claim is made that the defendant has ever refused to send messages for the relator, and the only question in respect to the transmission of messages in controversy here is, Can the relator demand the right to transmit them according to its own pleasure? Neither the rules established by the courts, nor the statute referred to justify such a holding, and in that respect, therefore, the rules and regulations of the defendant seem to be reasonable and proper.

The objection that so much of defendant's regulations as prevents the use of the telephone by a subscriber for the purpose of calling messengers except from the Central office, is unreasonable, seems to me to be well taken. The defendant urges that the messenger business as conducted by it is profitable, and for that reason it is desirable that it should be retained as free from competition as possible; and in aid of its position invokes the rule as established by the courts, that it owes no such duty to its rival as the permission to use its property for the purpose of a competing business, would constitute. The rule cannot be questioned, but the application is faulty. The messenger business, although carried on by the same company and at the same offices, is nevertheless a distinct and separate business, and in nowise essential to the conduct of the defendant's system of transmitting messages by telephone, for which purpose it was incorporated. To extend the rule protecting its business from rivals, so as to include any other business in which it might see fit to engage, could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants, and to the detriment of the public generally.

In Louisville Transfer Co. *v.* Am. Dist. Tel. Co., 24 Alb. L. J. 283-284, both parties were engaged in the carriage and coupé service, and the defendant insisted upon the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupés. The court held otherwise, and granted an injunction restraining defendant from removing the telephone, and from refusing to transact plaintiff's business. The decision of the court in that case is applicable to the question here involved, and its reasoning is approved.

It follows: First. That the relator is entitled to a *mandamus* directing and commanding the defendant to place a telephone in its office on compliance with defendant's rules and regulations, and payment by it of defendant's proper charges.

Second. That so much of defendant's regulations as provide that the telephone shall not be used "for calling messengers except from

the Central Office," are unreasonable, and need not be acceded to by the relator.

Third. As it was stated upon the argument that a review of the decision was intended, an application for a stay under section 2,089, Code Civ. Pro., will be entertained.

CHESAPEAKE AND POTOMAC TELEPHONE CO. *v.* BALTIMORE AND OHIO TELEGRAPH CO.

COURT OF APPEALS, MARYLAND, 1887.

[66 *Maryland*, 399.[1]]

ALVEY, C. J. This was an application by the appellee, a telegraph company, to the court below for a *mandamus*, which was accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

The appellant appears to be an auxiliary company, operating the Telephone Exchange under the patents known as the Bell patents. Those patents, formerly held by the National Bell Telephone Company, are now held by the American Bell Telephone Company, a corporation created under the law of the State of Massachusetts. The patents, with the contracts relating thereto, were assigned by the former to the latter company, prior to the 23d of May, 1882, and it is under a contract, of the date just mentioned, that the appellant acquired a right to use the patented devices in the operation of its system of telephonic exchanges.

In the agreed statement of facts, it is admitted that all the telephones used by the Chesapeake and Potomac Telephone Company (a company to which the appellant is an auxiliary organization), and also all the telephones used by the appellant in its Exchange in the City of Baltimore, and elsewhere in the State, are the property of the American Bell Telephone Company. It is alleged by the appellee and admitted by the appellant, that the offices of the Western Union Telegraph Company of Baltimore City are connected with the Telephone Exchange of the appellant, and that when a subscriber to the Telephone Exchange wishes to send a message by way of the lines of the Western Union Telegraph Company, the subscriber calls up the Telephone Exchange, and the agent there connects him with the office of the Western Union Telegraph Company, and the subscriber thereupon telephones his message over the lines of the appellant, to the Western Union Telegraph office; and a like process is repeated when a message is received by the Western Union Telegraph Company for a subscriber to the Telephone Exchange of the appellant. The appellee is a com-

[1] Part of the opinion only is given. — ED.

peting company, in the general telegraph business, with the Western Union Telegraph Company. And being such, it made application to the appellant to have a telephone instrument placed in its receiving room in Baltimore, and that the same might be connected with the Central Exchange of the appellant in that city; so that the appellee might be placed upon the same and equal footing with the Western Union Telegraph Company, in conducting its business. This request was refused, unless the connection be accepted under certain conditions and restrictions, to be specially embodied in a contract between the two companies, and which conditions and restrictions do not apply in the case of the Western Union Telegraph Company.

It appears that there were conflicting claims existing as to priority of invention, and alleged infringement of patent rights, which were involved in a controversy between the Western Union Telegraph Company and others, and the National Bell Telephone Company, to whose rights the American Bell Telephone Company succeeded; and in order to adjust those conflicting pretensions, the contract of the 10th of Nov., 1879, was entered into by the several parties concerned. The contract is very elaborate, and contains a great variety of provisions. By this agreement, with certain exceptions, the National Bell Telephone Company was to acquire and become owner of all the patents relating to telephones, or patents for the transmission of articulate speech by means of electricity. But while it was expressly stipulated (Art. 13, cl. 1) that the right to connect district or exchange systems, and the right to use telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it for the purpose, it was in terms provided that "such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news, for sale or publication, *in competition with the business* of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company. And the party of the second part [National Bell Teleph. Co.], *so far as it lawfully and properly can prevent it, will not permit* the transmission of such general business messages, market quotations, or news, for sale or publication, over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones, or patents, for the transmission of such general business messages, market quotations, or news, for sale or publication, *in competition with such telegraph business* of the Western Union Telegraph Company, or that of the Gold and Stock Telegraph Company." The contract of the 23rd of May, 1882, under which the appellant derives its right to the use of the patented instruments, was made in subordination to the prior contract of the 10th of Nov., 1879, and contains a provision to conform to the restrictions and conditions just quoted. In that subordinate contract it is provided that "no telegraph company, unless specially permitted by the licensor, can be a subscriber, or use the system to collect and deliver messages from and to its customers," &c.

These contracts are pleaded and relied on by the appellant as affording a full justification for exacting from the appellee a condition in the contract of subscription to the Exchange, that the latter should observe the restrictions in favor of the Western Union Telegraph Company. The appellant contends that these restrictive conditions in the contracts recited are binding upon it, and that it is not at liberty to furnish to the appellant, being a telegraph company, the instruments applied for and place them in connection with the Exchange, unless it be subject to the restrictive conditions prescribed. And if this be so, the Court below was in error in ordering the mandamus to issue. But is the contention of the appellant well founded, in view of the nature of the service that it has undertaken to perform?

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case, the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within this State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations, or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And such being the plain duty of those owning or operating telegraph lines, or telephone lines and exchanges, within this State, they cannot be exonerated from the performance of that duty, by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the

State has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce, and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And such being the case, the owner of the property thus devoted to public use, must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of Munn *v.* Illinois, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of Hockett *v.* State, 105 Ind. 250, where the cases upon this subject are largely collected, it was held, applying the principle of Munn *v.* Illinois, that it was competent to the State to limit the price which telephone companies might charge for their patented facilities afforded to their customers. And if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.[1]

STATE EX REL. SNYDER *v.* PORTLAND NATURAL GAS AND OIL CO.

SUPREME COURT OF INDIANA, 1899.

[153 *Ind.* 483.[2]]

JORDAN, C. J. This is a proceeding in *quo warranto* by the State of Indiana on the elation of the prosecuting attorney of the twenty-sixth Judicial Circuit to dissolve and seize the corporate franchises of appellee. The venue of the cause was changed from the Jay Circuit Court to the Randolph Circuit Court, in which court a demurrer was sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The State appeals and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information alleges that the defendant is a corporation duly organized in December, 1886, under the laws of the State of Indiana relating to the incorporation of manufacturing and mining companies. The object of its organization is to conduct the business of mining oil and gas, and to furnish the same for fuel and illuminating purposes and

[1] *Compare:* Western Union *v.* Chicago R. R., 86 Ill. 246; Western Union *v.* Atlanta, &c. R. R., 5 Oh. St. 407; Union Trust *v.* Atcheson, &c. Co., 8 N. M 327. — ED.

[2] This case is abridged. — ED.

for propelling machinery, &c. Its place of business or operation is stated to be at the city of Portland, in the State of Indiana. After its incorporation it obtained from said city permission to lay gas pipes along and under the public streets of that city for the purpose of supplying its inhabitants with gas for light and fuel, and it engaged in furnishing gas to them for such purposes. That the Citizens Natural Gas and Oil Company was also duly incorporated in February, 1889, under the same laws and for the same purposes as was defendant, and it also was granted the privilege by the city of Portland to lay its pipes in and along the streets of the city for the same purposes as was defendant, and it engaged in supplying gas to the inhabitants of said city for fuel and light.

After alleging these facts, the information charges that the defendant, on the 1st day of September, 1891, "in violation of law and in the abuse of its corporate powers and in the exercise of privileges not conferred upon it by law" entered into a certain agreement or combination with said Citizens Gas and Oil Mining Company "to fix the rate of gas to be charged by them and each of them to the consumers in said city of Portland." It was further agreed by and between the defendant and said other mentioned company that "neither of said companies should or would attach the service pipes of any gas consumer in said city to its pipe lines if, at the time, such customer or consumer was a patron of the other company."

It is further averred that the defendant has observed and complied with said agreement, and the price of gas has been fixed thereby, and it has at all times refused to sell or furnish gas to the inhabitants of said city at any other price than the one fixed by said agreement, and, in pursuance of said agreement and in order to prevent competition, it has refused, and still refuses, to supply divers inhabitants of the said city of Portland with gas who, as it is alleged, were consumers of gas from the pipe line of the said Citizens Gas and Oil Mining Company. It is further alleged that there is no other corporation, company, or person in said city engaged in supplying gas for light and fuel to its inhabitants.

The information is not a model pleading, and may perhaps be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision is: Are the facts, as therein alleged, sufficient to entitle the State to demand that the appellee's corporate franchises shall be declared forfeited?

Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain. Acts 1889, p. 22, § 5103, Burns, 1894. Being the creature of the law, the franchises granted to it by the State, in theory at least, were granted as a public benefit, and in accepting its rights, under the laws of the State, it impliedly agreed to carry out the purpose or object of its creation, and

assumed obligations to the public; and such obligations it is required to discharge. Beach on Monopolies and Industrial Trusts, § 221; Thomas *v.* Railroad Co., 101 U. S. 71.

It certainly can be said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty towards the citizens of the city of Portland and their duty towards it may be said to be somewhat reciprocal, and any dealings, rules, or regulations between it and them, which do not secure the just rights of both parties, cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it and complied with the company's reasonable regulations and conditions. Portland Natural Gas, &c. Co. *v.* State, 135 Ind. 54, and authorities there cited; People *v.* Chicago Gas Trust Co., 130 Ill. 268; Chicago, &c. Co. *v.* People's, &c. Co., 121 Ill. 530; Westfield Gas, &c. Co. *v.* Mendenhall, 142 Ind. 538; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1; Central Union Tel. Co. *v.* Falley, 118 Ind. 194; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341; 8 Am. and Eng. Ency. of Law, 614.

It is an old and familiar maxim that "Competition is the life of trade," and whatever act destroys competition, or even relaxes it, upon those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy. Greenhood on Public Policy, pp. 654, 655; Chicago, &c. Co. *v.* People's, &c. Co., *supra;* Gibbs *v.* Consolidated, &c. Co., 130 U. S. 396; Hooker *v.* Vandewater, 4 Denio, 349; Consumers Oil Co. *v.* Nunnemaker, 142 Ind. 560; Beach on Pr. Corp. §§ 54, 55.

The authorities affirm, as a general rule, that, if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public. Central Ohio, &c. Co. *v.* Guthrie, 35 Ohio St. 666; Swan *v.* Chorpenning, 20 Cal. 182; State *v.* Standard Oil Co., 49 Ohio St. 137; Gibbs *v.* Smith, 115 Mass. 592; Richardson *v.* Buhl, 77 Mich. 632; Pacific Factor Co. *v.* Adler, 90 Cal. 110; Beach on Monopolies and Industrial Trusts, § 82.

Recognizing and adopting the principles to which we have referred as sound law, we next proceed to apply them as a test to the facts involved in this case. It will not be unreasonable to presume that one of the objects upon the part of the city of Portland in granting permission to the Citizens Gas Company to lay its pipes and mains along and under the streets of that city, after it had awarded the same rights to appellee,

was that there might be a reasonable and fair competition between these two companies. By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other.

That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests.

From what we have said it follows that the court erred in sustaining appellee's demurrer to the information, and the judgment is therefore reversed and the cause remanded with instructions to the trial court for further proceedings consistent with this opinion.[1]

CHICAGO, M. & ST. P. R. R. *v.* WABASH, ST. L. & P. R. R.

CIRCUIT COURT OF UNITED STATES, 1894.

[61 *Fed.* 993.[2]]

CALDWELL, J. The design of the contract on which the appellant rests its claim is not left to presumption or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous competition by entering into an agreement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the means of the contract, all of the roads are to be operated, as to through traffic, "as they should be if operated by one corporation which owned all of them." These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract, — and it covered no inconsiderable portion of the traffic of the continent, — each company practically abdicated its functions as a common carrier, and conferred

[1] *Compare:* Gibbs *v.* Gas Co., 130 U. S. 396; Trust Co. *v.* Columbus, &c. R. R., 95 Fed. 22; Light Co. *v.* Sims, 104 Cal. 331; People *v.* Gas Trust, 130 Ill. 293; Light Co. *v.* Claffy, 151 N. Y. 42. — ED.

[2] Only opinion is printed. — ED.

them on a new creation, for the sole purpose of suppressing competition. Before they entered into this contract, each of these companies had the power, and it was its duty, to make rates for itself, and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect. The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a *quasi* public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy, and void. Railroad Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. *v.* State (Tex. Sup.), 10 S. W. 81; State *v.* Standard Oil Co. (Ohio Sup.), 30 N. E. 279; Texas & P. Ry. Co. *v.* Southern Pac. Ry. Co. (La.), 6 South. 888; Gibbs *v.* Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Salt Co. *v.* Guthrie, 35 Ohio St. 666; Stanton *v.* Allen, 5 Denio, 434; Hooker *v.* Vandewater, 4 Denio, 349; Chicago Gaslight & Coke Co. *v.* People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600; W. U. Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160; Sayre *v.* Association, 1 Duv. 143; U. S. *v.* Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58.

But, conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling, — one by an actual division of the traffic, and the other by a division of the gross earnings. The traffic not having been divided, this is a suit to enforce the second method of the pool, — a division of the gross earnings; or, in

other words, a pooling of the earnings. The illegal and void contract has not been executed, and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant, though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public, and illegal. But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for, the contract is not executed until the act is done and paid for. A court will not compel the act to be done, even though it has been paid for. Neither will it compel payment, although the act has been done; for this would be to enforce the illegal contract. The illegality taints the entire contract, and neither of the parties to it can successfully make it the foundation of an action in a court of justice. The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the Wabash Company less freight if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves, and carried by it over its own line. It was legally bound to accept the freight thus tendered, and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of Brooks *v.* Martin, 2 Wall. 70, is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defence against a demand that existed independently of the contract; whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478; Gibbs *v.* Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Texas & P. Ry. Co. *v.* Southern Pac. Ry. Co., 41 La. Ann. 970, 6 South. 888; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Hooker *v.* Vandewater, 4 Denio, 349. We have not overlooked the case of Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. 306. The opinion in that case is not supported by the authorities, and is unsound in principle.

The decree of the court below is affirmed.[1]

[1] *Compare:* U. S. *v.* Freight Ass., 166 U. S. 290; U. S. *v.* Joint Traffic Assn., 171 U. S. 505; Anderson *v.* Jett, 89 Ky. 375; R. R. *v.* R. R., 41 La. Ann. 940; R. R. *v.* R. R., 66 N. H. 100; Leslie *v.* Lorillard, 110 N. Y. 519; Cleveland R. R. *v.* Closser, 126 Ind. 362. — Ed.

Section II. With Adequate Facilities.

ANONYMOUS.

Common Pleas, 1348.

[*Y. B.* 22 *Lib. Assis., pl.* 41.]

I. de B. complains by his writ that G. de F. on a certain day and year at B. upon Humber had undertaken to carry his mare taken on his boat over Humber water safe and sound; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his wrong and damage, &c.

Richmond. Judgment of the writ; for he does not allege any tort in us; he only proves that he would have an action by a writ by way of covenant, or [not ?] by way of trespass: wherefore, &c.

Bankwell, J. It seems that you committed a trespass when you overloaded the boat, whereby his mare perished, &c.; therefore answer.

Richmond. Not guilty.

BREMNER *v.* WILLIAMS.

Common Pleas, 1824.

[1 *C. & P.* 414.]

Assumpsit against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

Best, C. J. The declaration states, that the defendant undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence. The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when

ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—Damages £51.[1]

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY *v.* SNYDER.

SUPREME COURT OF INDIANA, 1888.

[117 *Ind.* 435.[2]]

ELLIOTT, C. J. The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White River, and the appellee severely injured.

The twenty-second instruction asked by the appellant and refused, reads thus:

"The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances."

This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character the omission to exercise the highest degree of practical care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use, for the company is bound to test them from time to time to ascertain whether they are

[1] *Compare:* Readhead *v.* R. R., L. R., 4 Q. B. 379; Carter *v.* St. R. R., 42 Fed. 37; Sales *v.* Stage Co., 4 Ia. 547; Ingalls *v.* Bills, 9 Met. 1; Gilson *v.* Horse R. R., 76 Mo. 282; Faurish *v.* Reigle, 11 Gratt. 697. — ED.

[2] This case is abridged. — ED.

being impaired by use or exposure to the elements. Manser *v.* Eastern, &c. R. W. Co., 3 L. T. (N. S.) 585; Texas, &c. R. W. Co. *v.* Suggs, 62 Texas, 323 (21 Am. & Eng. R. R. Cases, 475); Stokes *v.* Eastern, &c. R. W. Co., 2 F. & F. 691; Robinson *v.* New York, &c. R. R. Co., 9 Fed. Rep. 877; Richardson *v.* Great Eastern R. W. Co., L. R. 10 C. P. 486; s. c. L. R. 1 C. P. Div. 342; Ingalls *v.* Bills, 9 Met. 1; Funk *v.* Potter, 17 Ill. 406; Bremner *v.* Williams, 1 Car. & P. 414; Hegeman *v.* Western R. R. Co., 13 N. Y. 9; Alden *v.* New York Central R. R. Co., 26 N. Y. 102.

The decision in the case of Grand Rapids, &c. R. R. Co. *v.* Boyd, 65 Ind. 526, is not in conflict with this doctrine, for in that case an inspection was made. *Judgment affirmed.*[1]

CAMDEN AND ATLANTIC RAILROAD CO. *v.* HOOSEY.

SUPREME COURT OF PENNSYLVANIA, 1882.

[99 *Pa. St.* 497.[2]]

MR. JUSTICE STERRETT delivered the opinion of the court, February 20th, 1882.

The single breach of duty with which the defendant below was specifically charged, as the only ground of liability to the plaintiff for the injury he sustained in falling off the platform of the car on which he was then standing, was the failure of the company to provide a sufficient number of cars to seat all the passengers on the train.

Without assenting to the broad proposition contended for, that a railroad company, using steam motive power, is bound absolutely and under all circumstances to provide every passenger on the train with a seat, it cannot be questioned that, as a general rule and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations and seats for those whom it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence. There appears to be nothing in the circumstances of this case to exempt the company from that general rule of duty; and if its negligence was the proximate cause of the plaintiff's injury, the liability of the company would necessarily follow, unless the plaintiff himself was guilty of negligence which contributed thereto. His contention was that, in common with many other passengers, he was unable to procure a seat, and while searching for one he was thrown from the platform of one of the cars, and thus sustained the

[1] *Compare:* Grote *v.* R. R., 2 Exch. 251; Ford *v.* R. R., 2 F. & F. 730; Wheaton *v.* R. R., 36 Cal. 590; Hall *v.* Steamboat Co., 13 Conn. 319; Fuller *v.* Talbot, 23 Ill. 357; McElroy *v.* R. R., 4 Cush. 400; Carroll *v.* R. R., 58 N. Y. 126. — ED.

[2] Opinion only is printed. — ED.

serious injury which resulted in the loss of his arm. The over-crowded condition of all the cars composing the train, and the consequent inability of the plaintiff and others to procure seats, were facts clearly proven.

It is very evident from the plaintiff's own statement that, at the time of the accident and for some minutes before, he was not in the act of passing from one car to another in search of a seat: on the contrary, he was standing quite near the edge of the platform with his back to the end window of the car. He was not only in a position of known danger, but was there voluntarily and in disregard of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion. While he was thus standing on the platform, persons passed from one car to the other in both directions, and there is nothing whatever to show that he could not have gone into the next car if he had been so disposed. Neither he nor any other witness pretends to say it was necessary for him to stop and stand on the platform.

In the seventh point of the defendant below, the court was requested to charge "That even if a search for a seat was the real purpose of the plaintiff in going out on the platform, and even if it were not negligence for him to have crossed from car to car for that purpose, yet, if the jury believe from the evidence that he lingered on the platform, instead of immediately crossing, the verdict should be for the defendant." The learned judge, in affirming this proposition, added the qualifying words, "unless compelled thereto by circumstances." The jury was thus authorized to inquire whether or not the plaintiff was compelled by circumstances to linger on the platform. We see nothing in the testimony to warrant the submission of this inquiry to the jury. As already intimated, there was not a particle of testimony from which it could be reasonably inferred that plaintiff was compelled to take or retain the position he did on the platform. Having shown by his own testimony that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice. While the latter was clearly shown, there was no testimony tending to prove the former. The point should have been affirmed without the qualification complained of. But, for reasons already suggested, we think the court should have gone further, and instructed the jury as requested in defendant's ninth point, which was: "That the evidence shows negligence on the part of plaintiff which contributed to produce the injury complained of, and therefore he cannot recover."

The dangerous position on the platform in which the plaintiff voluntarily placed himself, while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury: but, in the absence of such evidence, it was error

to refuse the point, and leave it to the jury to determine whether he was or was not guilty of contributory negligence.

Of all the passengers on a long train of twenty over-crowded cars the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car, while the train was in rapid motion, it is not at all probable he would have been injured. His much-to-be-regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony, from which no other conclusion could reasonably be drawn. *Judgment reversed.*

Mercur, Gordon, and Trunkey, JJ., dissented.[1]

MEMPHIS AND CHARLESTON RAILROAD COMPANY *v.* BENSON.

Supreme Court of Tennessee, 1887.

[85 *Tenn.* 627.[2]]

Lurton, J. This was a suit for damages for an alleged unlawful ejection of the defendant in error from the train of the plaintiff in error. There was a judgment for $500 in favor of the defendant in error rendered by the circuit judge, who tried the case without a jury. The railway company have appealed, and a number of reasons are assigned for reversal.

The defendant in error went upon the passenger train at Memphis, Tenn., and went into the car set apart for ladies and gentlemen travelling with ladies. This car at the time was overcrowded, and he was unable to obtain a seat, and this condition of things he saw before the train left Memphis, yet he made no demand at Memphis, the terminal station, for a seat; but, preferring to take his chances to get a seat, he remained on the car standing until after the train had started upon its trip. After the train had gotten well out of Memphis the usual demand was made upon him for his ticket. This he declined to surrender, taking the position that he would not surrender his ticket until he had been furnished with a seat. The conductor called his attention to the fact that there was not a vacant seat in the car in which he was, and offered to get him a seat in the next forward car, and further saying that it would be but a short time before seats would be vacated by passengers for local stations, and that he would then give him a seat in the ladies' car. This he declined, and demanded a seat in the ladies' car before surrendering his ticket.

[1] *Compare:* R. R. *v.* Fisher, 31 Ill. App. 36; R. R. *v.* Paterson, 69 Miss. 421; Hardenburgh *v.* R. R., 39 Minn. 3; Miller *v.* Steamboat Co., 58 Hun, 424; Werle *v.* R. R., 98 N. Y. 650. — Ed.

[2] Opinion only is printed. — Ed.

The demand of the conductor for his ticket was renewed in a short time, with the statement that he must either get off the train or surrender his ticket. This demand was again refused, and he further declared that he would not leave the train. Upon the train stopping at the next regular station he, still refusing to leave the train, was ejected.

He neither surrendered his ticket to the conductor or showed that he had such ticket, nor did he state the point to which he was destined. He bases his refusal to go into the forward car upon the ground that it was a smoking-car, and that the foul air of such a car was likely to make him ill.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him with a seat without transportation than it is when he is offered transportation without a seat. It is equally well settled that the passenger need not surrender his ticket until he is furnished with a seat, for the ticket is the evidence of the contract which entitles him to one. But it cannot be that one may ride free because not furnished with a seat. If the passenger chooses to accept transportation without a seat, he must, on demand, pay his fare. If unwilling to ride without transportation is furnished him in a seat, he must get off at first opportunity, and by so doing may bring his action for breach of contract, and recover as damages such sum as will compensate him for such breach, including such damages as are the natural and immediate results of such breach. Rorer on Railroads, 968, 969; Davis *v.* Railroad, 53 Mo. 317; Railroad *v.* Leigh, 45 Ark. 368.

It results that for the indignity and vexation consequent upon the ejection in this case there can be no recovery. This result is made the more certain by the facts of this case, it appearing that at the time this passenger entered the car at the terminal station he saw that this car assigned to ladies, and gentlemen with ladies, was overcrowded, and he knew that he must either ride standing or take a seat in the car called the smoking-car. He gave the railway company no opportunity to furnish additional seats while at this terminal station. We have at this term, in the case of Railroad Company *v.* Ida Wells, 1 Pickle, 613, held that a railway company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable. This rule has been sustained in the courts of many States. Westchester Railroad Company *v.* Miles, 55 Penn. 209; Chicago & Northwestern Railroad *v.* ———, 55 Ill. 185.

So we think a regulation setting apart a car for ladies, or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will set or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers

on the same train, he cannot complain, and this was the substance of our decision in the Ida Wells case. The doctrine is equally applicable here. This passenger, when he took passage at Memphis, did it with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car or go into the car designed exclusively for gentlemen, and in which smoking was permitted. The requirement that he should go temporarily into the smoking-car under these circumstances was not unreasonable. He ought not to have started when he did unless willing to submit to what he realized was an inevitable necessity without giving the carrier notice of his demand.

But upon another ground this judgment cannot be sustained, even for damage for breach of contract. The defendant in error in his deposition states that he had a ticket purchased at Austin, Texas, which entitled him to passage to Atlanta, Ga., and that one of the coupons upon this ticket entitled him to passage over the road of plaintiff in error from Memphis to Chattanooga. The ticket he does not produce, nor does he account for his failure to produce it by proof of its loss, or that he had subsequently used it. Objection was taken to this evidence, and the objection overruled, upon promise of counsel, at a subsequent stage of the trial, to account for its non-production so as to let in secondary evidence of the fact of the contract therein contained. This was not done. It is elementary law that the contents of a written or printed contract cannot be proven without the failure to produce the paper itself is accounted for. This objection is fatal to the whole case of defendant in error; for there is no legal evidence that he had a ticket. This being so, he was rightfully ejected.

The conductor who ejected this passenger, while using no unnecessary force, did use unnecessarily abusive language, such as was calculated to unnecessarily insult and degrade the person ejected. In exercising a legal right of ejection, railway companies must not do so in an abusive way. They are the servants of the public, and while their right to enforce reasonable regulations will be upheld, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as from unnecessary indignity. The unreasonable demands of the defendant in error afford some excuse for the temper shown by the conductor.

In view, however, of the absence of any proof of a legal character that the ejected passenger had any ticket, and his refusal to pay fare, and that, therefore, the relation of passenger and carrier did not exist, we are constrained to reverse the judgment of the circuit judge, and enter judgment here for plaintiff in error, the carrier in such case not being held responsible for the ejection.[1]

[1] *Compare:* R. R. *v.* Sims, 27 Ind. 59; R. R. *v.* Smith, 70 Ky. 497; R. R. *v.* Drummond, 73 Miss. 813; R. R. *v.* Burns, 51 N. J. L. 340; Peck *v.* R. R., 70 N. Y. 587; Bass *v.* R. R. 36, Mo. 450. — Ed.

SEARLES *v.* MANN BOUDOIR CAR CO.

CIRCUIT COURT OF THE UNITED STATES, 1891.

[45 *Fed. Rep.* 330.]

ACTION to recover damages for alleged wrongful refusal of defendant's conductor to sell plaintiff a berth in a sleeping-car. On the 30th day of June, 1888, plaintiff entered defendant's sleeping-car at Meridian, Miss., and applied to the sleeping-car conductor for a berth. He received answer that all the space was sold, and he could not be accommodated. He claimed that there was a vacant upper berth that he should have. This upper berth was part of a section that had been bought by a Mr. Watson, to whom plaintiff applied for the upper berth, and was refused. There was a rule of defendant company to the effect that no one party could retain an entire section when there was applicants for berths.

HILL, J. (charging jury). The issues which you are to determine from the evidence, are: First. Did the conductor of the sleeping-car then owned and operated by the defendant company unlawfully and wrongfully refuse to sell to the plaintiff a ticket entitling him to the use and occupation of one berth in said car from Meridian, in this State, to Cincinnati, in the State of Ohio, as alleged in the declaration, and denied in the plea of defendant? To entitle the plaintiff to a verdict in his favor the burden is upon him to reasonably satisfy you from the evidence that the conductor then in charge of said car did unlawfully and wrongfully refuse to sell plaintiff such ticket, and place him in possession of one berth in said car. The uncontradicted testimony is that soon after the train to which the sleeper was attached left Meridian the plaintiff did apply to the conductor for a berth in the sleeper from Meridian to Cincinnati, and tendered him the money for the fare; to which the conductor replied that he had no vacant berth at his disposal, but that there was one berth in a section (or room, as they are constructed on this class of sleepers), all of which section had been purchased and paid for in New Orleans, and which upper berth was not then occupied by the purchaser, and who had only purchased the berth to Birmingham, Ala.; that if plaintiff would apply to Mr. Watson, the purchaser and occupant, he thought he would let plaintiff have it; to which plaintiff replied that he had the right to it, and demanded it on such right; to which the conductor replied that Mr. Watson had the right to its use to Birmingham, and that he could not deprive him of it, but that he would ask him for it for the use of the plaintiff. He did so apply, and Watson refused to surrender the use of the berth to the plaintiff. These facts being admitted, you are instructed that the defendant company had the right to sell the use of the whole section or room to Watson, and, having done so, and received the pay for it,

Watson was entitled to the use of the entire section for himself and such other persons as he might choose, and who was otherwise a proper person to occupy the sleeper to Birmingham, Ala., and that the conductor was guilty of no wrong in refusing to sell the use of this berth to the plaintiff, and put him in possession of it; and therefore you are instructed to return your verdict in favor of the defendant on the issue on the first count in the declaration.

The second issue which you will determine from the evidence is: Did the conductor unlawfully and wrongfully refuse to sell the plaintiff a ticket entitling him to the use of one berth on the sleeper from Birmingham to Cincinnati, as alleged in the second count in the declaration, and denied by the plea of the defendant? The burden of proving this allegation in the plaintiff's declaration is on him. There being some conflict in the testimony on this point, you are instructed that, while the conductor might have sold to plaintiff a ticket entitling him to the use of this berth from Birmingham to Cincinnati before reaching the former place, he was not under any obligation to do so, and his refusal so to do created no liability upon the defendant; but that, when the train arrived at Birmingham, and Watson's right of occupancy had ceased, and the plaintiff had applied for this or any other vacant and unoccupied berth in the sleeper, and tendered the usual fare for the use of it, and was refused by the conductor, then such refusal would have been wrongful, and the finding on this issue should be for the plaintiff, and entitle him to such reasonable, actual damages as in your judgment, from the proof, he has sustained by reason of being deprived of the use of the berth from Birmingham to Cincinnati, less the amount of the fare. You are further instructed that if the proof shows that application had been made for a berth in the sleeper by another man at Meridian, before the plaintiff made application, then the conductor had the right to sell the ticket for the berth to him in preference to the plaintiff. You are the sole judges of the weight to be given to the testimony of the witnesses on both sides. You will reconcile any conflict that may exist in the testimony of the witnesses, if you can; if not, then you will determine from all the testimony which most probably gave the facts truly. In considering the testimony you will consider the interest each witness may have in the result of your verdict, the manner in which they have testified, and the reasonableness of their statements in connection with all the testimony.

The jury returned a verdict in favor of defendant on both counts of the declaration.[1]

[1] *Compare:* Boudoir Car Co. *v.* Dupre, 54 Fed. 646; Palace Car Co. *v.* Taylor, 65 Ind. 153. — Ed.

FELL *v.* KNIGHT.

EXCHEQUER, 1841.

[8 *M.* & *W.* 269.[1]]

[CASE. The declaration stated that the defendant did keep a certain common inn for the reception of travellers, that the defendant had sufficient room and accommodation for the plaintiff, that the plaintiff was ready and willing to pay therefor; nevertheless that the defendant not regarding his duty as such innkeeper, denied the plaintiff accommodation, etc.

Plea. That the defendant offered to the plaintiff to allow him to sleep in any one of certain bedrooms; but the plaintiff refused to sleep in any of said bedrooms, but requested that candles might be brought him in order that he might sit up all night in another upstairs room in said inn, which the defendant then reasonably refused.]

Lord ABINGER, C. B. I am of opinion that the plea is sufficient. I do not think a landlord is bound to provide for his guest the precise room the latter may select. Where the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle-light in a bedroom, provided he offers him another proper room for the purpose? The plea shows, that the landlord did everything that was reasonable. The short question is, is a landlord bound to comply with the caprice of his guests, or is he justified in saying, You shall not stay in a room in this way, and under these circumstances? I think he is not bound to do so. All that the law requires of him is, to find for his guests reasonable and proper accommodation; if he does that, he does all that is requisite. I am also inclined to think, notwithstanding the case which has been cited of Rex *v.* Jones, that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was ready to pay; he should state further that he was willing and offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows, so that no tender can be made; but I rather think those facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment of my Brother Coleridge, in the case cited: but it is not necessary to decide that point in the present case. This rule must be discharged.

ALDERSON, B., and ROLFE, B., concurred. *Rule discharged.*[2]

[1] This case is abridged. — ED.

[2] *Compare:* Claypool *v.* McAllister, 20 Ill. 504; R R. *v.* Pearl, 3 Wills (Tex.), 4. — ED.

GARDNER *v.* PROVIDENCE TELEPHONE CO.

SUPREME COURT OF RHODE ISLAND, 1901.

[50 *Atl. Rep.* 1014.]

PER CURIAM. The evidence shows, as stated by the complainant, that the defendant refuses to furnish a long-distance extension set in connection with a grounded telephone circuit. The evidence does not convince a majority of the court that such a combination can be made generally without impairment of the service. The uniform practice of the company is against this contention. The company offers to annex to the complainant's grounded circuit, for a reasonable price, such an extension set as is appropriate for the circuit, and which it contends will give satisfactory service. This is all that the complainant can demand. He is in default in not requesting the company to provide what it says it is willing to give him, and in insisting on the exact form of apparatus which he has installed. It is for the company, not for the subscriber, to determine the type of apparatus it shall use, and there is no evidence that the type it offers is inadequate. These points were fully considered by the court upon the former hearing, as a careful examination of the opinion will show. It may further be observed that in this case there is no evidence that the defendant's charge for a metallic circuit combined with a long-distance set is exorbitant. The well-known superiority of a metallic circuit to a grounded one in all essential features, and the greater cost of construction, make it reasonable to charge more for the use of the metallic circuit than for the other. The question of price is not strictly before the court, for the complainant does not desire this kind of service, and the defendant will not tolerate the combination which the complainant has made at any price.

The motion for re-argument is denied.

PENISTON *v.* CHICAGO, ST. LOUIS, AND NEW ORLEANS RAILROAD CO.

SUPREME COURT OF INDIANA, 1882.

[34 *La. Ann.* 777.]

POCHÉ, J. Plaintiff, a passenger on a train of the defendant from Chicago to New Orleans, was injured while walking from an eating station to her train, on the defendant's road, and has recovered, in this suit, a verdict and judgment for damages in the sum of six thousand dollars.

The evidence is decidedly conflicting, but a careful reading of the record has satisfied us that the following facts are established:

On the 31st of January, 1878, while plaintiff, accompanied by her daughter and her son-in-law, were passengers on a train of the defendant, from Chicago to New Orleans, they came out of their car at about eight o'clock at night, at Hammond Station, then a regular supper station on said road, according to its schedule, for the purpose of taking necessary refreshments.

The building in which meals are served is situated at a considerable distance from the railroad, and is reached by passengers who alight on the main track of the road, by crossing over a side track, and passing on a large platform, and thence through a narrower and covered platform which leads into the hotel.

On the arrival of the train, a torchlight burning on an elevated platform affords ample light to guide the steps of passengers to the covered platform, where two or three lamps light up the way to the interior of the building.

After supper, and on returning to their train, plaintiff and her companions discovered that the torchlight had ceased to burn, and that there was no other light or signals to guide their steps securely through the large platform in front of the hotel to their train, and that there was no officer or employee of the company charged with the duty of pointing out to passengers the way from such platform to their train. Their train, which they had left on the main track, had been removed therefrom and placed on the side track lying next to the hotel, and another train, since arrived, was then occupying the position on the main track, where they had left their train on alighting for supper. They had received no information, officially or otherwise, of those changes, operated while they were in the supper room.

Finding a train on the side track, and believing that to be a new train, which was standing between them and their train, they concluded to go around said former train, so as to reach theirs, and to do so they followed the platform fronting the hotel, and on which there was no light, and not noticing the termination on said platform on two steps of stairs leading to the main ground, plaintiff, who walked in the lead of her companions, fell to the ground, dislocating her ankle and fracturing her leg in two places, from which she suffered great pain, was confined to her room for four months, was compelled to walk on crutches for eight months, and from which injuries she has not yet recovered the free use of her limb.

Defending under a general denial, the corporation urges its want of responsibility, on the grounds:

1. That the hotel and platform are not the property of the company, but of another person, for whom defendant is in no manner responsible.

2. That the accident occurred through plaintiff's own fault, who should not have attempted to walk around the train on the side track, which was her train, the approach of which, from the eating station,

was made easy and safe by lights burning in the covered platform and in a lunch stand situated at the rear end of said gangway, and who should have made inquiries concerning her train.

These propositions involve the discussion of the degree of care, attention, and protection which railroad companies, as common carriers, owe to their passengers.

In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life, by means of food and necessary refreshments. Hence it is, that on all such roads, arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employees of the road of the approach of a train to a station where, under arrangements with the company, meals are prepared for the convenience of its passengers.

It is well established in jurisprudence that railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, &c., and it is well settled that any person injured, without fault on his part, by any dereliction of its duty in the premises by a railway company, can recover damages against the corporation for injuries thus received. Cooley on Torts, pp. 605, 606, 642; Addison on Torts, § 245; Shearman & Redfield, p. 327, § 275.

This principle has been applied in a case where a passenger, an old lady, was put out at her destination, at a station where there was no light to guide her steps, and no employee of the company to show her the way out of the station grounds, and was injured in trying to go from the station to a friend's house, by falling from the platform. Patten *v.* Chicago & Northwestern R. R. Co., 32 Wis. 528.

Under the same rule, a railway company was held responsible for injuries received by a passenger in walking from one of its trains to a transfer boat, by falling on a wharf on which there was not sufficient light. Beard *v.* Conn. & Pass. Rivers R. R. Co., 48 Vt. 101.

In the enforcement of the same rule, a railway company was mulcted in damages in a case where a lady passenger, alighting from her train at her destination, and finding no safe and convenient platform leading to the highway, attempted to walk across three of the railroad tracks, and falling in a "cattle-guard" filled with snow, was run over and killed by another train of the same company. Hun, N. Y. Reports, vol. 13, 589; see also 56 Me. 244; 16 How. 469.

The obligation of furnishing, by railway companies, safe and easy ingress and egress to and from their platforms, has been extended so as to embrace cases of persons who were not passengers on their roads, but who came on business to their stations, and were injured by means of insufficient or defective platforms, such as a hackman who had transported passengers to a railroad depot. 59 Maine, 183; see also

Jamison *v.* San Jose R. R. Co. (California), 11 Reporter; Law *v.* Grand Trunk R. R. Co. (Maine), 12 Reporter, p. 397.

Fully indorsing and concurring with this jurisprudence, we hold that the defendant company is legally bound to furnish to its passengers an easy and safe mode of going to and from its trains, and such eating stations as it may have provided for the wants and convenience of its passengers, and that for the purpose of enforcing this obligation, it is immaterial whether the eating station is owned and kept by the company or by another person, with an understanding with the company as to the time of preparing and furnishing the meals.

In our opinion, this obligation imposes upon the railway company the duty of having ample and sufficient lights, for meals furnished at night, to safely guide their passengers to and from the hotel or eating station, and in case trains are removed from one track to another during the meal, to inform, by employees, the passengers on their egress from the eating or dining room, of the exact location of their respective trains.

We have given due and respectful consideration to the testimony of defendant's witnesses, who state that the platform was sufficiently lighted for all purposes needed by the passengers. These witnesses are the train conductor, two or three other railroad employees, the proprietor of the hotel, his lessee, who keeps it, and the local postmaster, who are all familiar with the place, are there at the arrival of every train, which they all designate by their numbers, are familiar with the rules of the company, and know that during the supper meal the southbound train is moved to the side track from the main track, which is then occupied by the northbound train. It stands to reason that the light which will be sufficient to enable such persons to move about in perfect safety, will not be sufficient to safely guide a stranger, especially a woman who comes from a distant land, is aroused in her sleeping car by the sudden and shrill announcement by a brakeman of "twenty minutes for supper," and alights from her car in the brilliant torchlight, is shown to the hotel by numerous and zealous runners or servants, in great eagerness to secure her patronage, and who lose sight of her after receiving her money, and now that the torch is out, she is left alone, unaided and unprotected, to grope her way in darkness to her train, which is not now where she left it a few minutes before. Hence, it is but fair, reasonable, and just, to hold the railway company strictly responsible for the injuries which she received in her attempt to discover the location of the train on which she was a passenger.

Under the peculiar circumstances of this case, in which plaintiff is shown to have suffered for months excruciating pains, was forced to great expense in the employment of surgeons and nurses, and is yet in a crippled condition, we are not prepared to say that the verdict of the jury was excessive.

The district judge did not err in overruling defendant's motion for a

new trial, urged on the ground of newly discovered evidence, as it appeared that the witness on whose testimony it was based could only corroborate defendant's other witnesses.

The judgment of the lower court is, therefore affirmed with costs.

Rehearing refused.

Levy, J., absent.[1]

CRAKER *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court of Wisconsin, 1875.

[36 *Wis.* 657.[2]]

Appeal from the Circuit Court for Sauk County.

Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial.

The court refused a nonsuit, and instructed the jury, in substance, that if plaintiff, whilst a passenger as above stated, was abused, insulted, or ill-treated by the conductor of the train, defendant was liable to her for such injury as might be found from the evidence to have been inflicted. Defendant requested the court to instruct the jury, that upon the evidence plaintiff was not entitled to recover, "the acts of the conductor complained of not having been committed within the scope of his employment or in the performance of any actual or supposed duty;" but the instruction was refused.

Plaintiff had a verdict for $1,000 damages; a new trial was denied; and defendant appealed from a judgment on the verdict.

Ryan, C. J. There can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent

[1] *Compare:* R. R. *v.* Orr, 46 Ark. 182; R. R. *v.* Nuswanger, 41 Kans. 625; R. R. *v.* Lucas, 119 Ind. 583; Knight *v.* R. R., 56 Me. 234; Dodge *v.* Steamboat Co., 148 Mass. 207; R. R. *v.* Sue, 25 Neb. 772; Stewart *v.* R. R., 53 Tex. 289; Beard *v.* R. R., 27 Vt. 377. — Ed.

[2] This case is abridged. — Ed.

of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it.

In Bass *v.* Railway Co., we had occasion also to consider somewhat the nature of the obligations of railroad companies to their passengers under the contract of carriage; the "careful transportation" of Railroad Co. *v.* Finney. On the authority of such jurists as Story, J., and Shaw, C. J., we likened them to those of innkeepers. And, speaking of female passengers, we said: "To such, the protection which is the natural instinct of manhood towards their sex, is specially due by common carriers." In Day *v.* Owen, 5 Mich. 520, the duties of common carriers are said to "include everything calculated to render the transportation most comfortable and least annoying to passengers." In Nieto *v.* Clark, 1 Clifford, 145, the court says: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach." Long before, Story, J., had used this comprehensive and beautiful language, worthy of him as jurist and gentleman, in Chamberlain *v.* Chandler, 3 Mason, 242: "It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil." These things were said, indeed, of passage by water, but they apply equally to passage by railroad. Commonwealth *v.* Power, 7 Met. 596.

These were among the duties of the appellant to the respondent, when she went as passenger on its train: duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her. If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. Stephen *v.* Smith, 29 Vt. 160; Railroad Co. *v.* Hinds, 53 Pa. St. 512; Commonwealth *v.* Power, *supra;* Nieto *v.* Clark, *supra;* and other cases cited in Bass *v.* Railway Co. We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the

appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfil the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.

We cannot think that there is a question of the respondent's right to recover against the appellant, for a tort which was a breach of the contract of carriage. We might well rest our decision on principle. But we also think that it is abundantly sanctioned by authority. Railroad Co. *v.* Finney, Bass *v.* Railway Co., Weed *v.* Railroad Co., Nieto *v.* Clark, Railroad Co. *v.* Hinds, and Railroad *v.* Rogers, *supra;* Railroad Co. *v.* Derby, 14 How. 468; Moore *v.* Railroad Co., 4 Gray, 465; Ramsden *v.* Railroad Co., 104 Mass. 117; Maroney *v.* Railroad Co., 106 Mass. 153; Coleman *v.* Railroad Co., 106 Mass. 160; Bryant *v.* Rich, 106 Mass. 180; Railroad Co. *v.* Vandiver, 42 Pa. St. 365; Railroad Co. *v.* Anthony, 43 Ind. 183; Railroad Co. *v.* Blocher, 27 Md. 277; Railroad Co. *v.* Young, 21 Ohio St. 518; Sherley *v.* Billings, 8 Bush, 147; Seymour *v.* Greenwood, 6 Hurl. & N. 359; Bayley *v.* Railroad Co., L. R. 7 C. P. 415. There are cases, even of recent date, which hold the other way. But we think that the great weight of authority and the tendency of decision sanction our position.

By the Court. — The judgment of the court below is affirmed.[1]

BATTON *v.* SOUTH AND NORTH ALABAMA RAILROAD CO.

SUPREME COURT OF ALABAMA, 1884.

[77 *Ala.* 591.[2]]

SOMERVILLE, J. The action is one of novel impression for which we nowhere find a precedent. It is a suit for damages against a com-

[1] *Compare:* Steamboat Co. *v.* Brockett, 121 U. S. 637; R. R. *v.* Kelly, 92 Ind. 371; Sherley *v.* Billings, 8 Bush, 147; Goddard *v.* R. R., 57 Me. 202; Dwinelle *v.* R. R., 120 N. Y. 117. — ED.

[2] Opinion only is printed. — ED.

mon carrier — a railroad company — instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station, belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who, having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham. Wabash R. R. Co. *v.* Rector, 9 Amer. & Eng. R. R. Cas. 264; Gordon *v.* Grand St. R. R. Co., 40 Barb. (N. Y.) 546.

The nuisance complained of appears to have been an extraordinary occurrence, and one which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well-considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In Britton *v.* Atlanta & Charlotte Railway Co., 88 N. C. 536 (18 Amer. & Eng. R. R. Cas. 391; s. c. 43 Amer. Rep. 748), the rule is stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a

police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purpose of this decision, as it seems to be supported by authority. New Orleans Railroad Co. *v.* Burke, 53 Miss. 200; Pittsburg R. R. Co. *v.* Hinds, 53 Penn. St. 512; Pittsburg R. R. Co. *v.* Pillow, 76 Penn. St. 510; Goddard *v.* Grand Trunk R. R. Co. (57 Me. 202), 2 Amer. Rep. 39; Cooley on Torts, 644–645; Nieto *v.* Clark, 1 Clifford, 145; Putnam *v.* Broadway R. R. Co., 55 N. Y. 108.

In the case of the Pittsburg Railway Co. *v.* Hinds, 53 Penn. 512, *supra,* the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who, defying the power of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies; the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said Woodward, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It cannot be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also, in a measure, to what has been termed "subsidiary arrangements." 2 Rorer on Railroads, 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are invited and expected to travel their roads. Knight *v.* Portland R. R. Co., 56 Me. 234; McDonald *v.* Chicago R. R. Co., 26 Iowa, 124. The measure of duty is admitted by all the authorities, however, not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature. Baltimore & Ohio R. R. Co. *v.* Schwindling, 8 Amer. & Eng. R. R. Cas. p. 552, note.

We do not think that there is any duty to police station-houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. 2 Kent Com. 593*. There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the com-

pany no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be commonly necessary nor customary. It was a risk which was incidental to one's presence anywhere when travelling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in rulings of the court, and the judgment must be affirmed.[1]

POUNDER *v.* NORTH EASTERN RAILWAY CO.

COURT OF APPEAL, 1892.

[1892. 1 *Q. B.* 385.[2]]

APPEAL from a judgment of the judge of the County Court of Durham, holden at Hartlepool, in an action to recover damages from the defendants for assaults committed upon the plaintiff whilst travelling upon the defendants' railway.

The following statement of facts is taken from the judgment of A. L. SMITH, J. : —

It was proved that the plaintiff, as one of the travelling public, took and paid for a third-class ticket for conveyance from Sunderland to Hartlepool by the defendant company, and that, when he did so, the company had no notice that he was exposed to any greater danger than one of the ordinary travelling public. As a matter of fact, the plaintiff was what in Durham of late has been known as a "Candy Hall man," that is, a man engaged upon the eviction of pitmen from their houses consequent upon disputes between them and their masters. For this reason the plaintiff had incurred the ill-will of pitmen in parts of that county, and was in danger of being molested by them. Having taken and paid for his ticket, the plaintiff, accompanied by two other "Candy Hall men," attempted to ride in the guard's van; but they were not allowed to do so, it being against the company's rules that this should be done, and the plaintiff and his two friends were placed by a servant of the company in a third-class carriage in which were then seated six or seven unexceptional passengers. The carriage was constructed to hold ten people. Evidence was given that at this time the company's servant was aware that the plaintiff was a "Candy Hall man," and that he feared violence from pitmen at the station; that after the plaintiff was seated in the carriage six or seven pitmen did rush in; that the company's servants did nothing towards either attempting to get the pitmen out, or to get the plaintiff a seat in another carriage, and that the train started with the six or seven pitmen

[1] *Compare:* Flint *v.* Transportation Co., 6 Blatch. 158; Putnam *v.* R. R., 55 N. Y. 108; Weeks *v.* R. R., 72 N. Y. 50. — ED.

[2] This case is abridged. — ED.

in the overcrowded carriage in which the plaintiff and his two friends were travelling; that during the journey to the first station at which the train stopped, viz., Ryhope, the plaintiff was assaulted by the pitmen; that at Ryhope these pitmen got out, and that another relay of pitmen then got in, and repeated the assault upon the plaintiff. For these assaults, which were obviously the independent acts of the assailants, wholly unconnected with the company, the action was brought against the company, and the county court judge held the defendants liable, and assessed the damages at £5.

The county court judge stated that he was of opinion that the allowing the carriage to be overcrowded, and especially after notice that the pitmen were threatening and intending to assault the plaintiff, and also the not removing either the pitmen or the plaintiff from the carriage at two different stations, was negligence on the part of the officers or servants of the defendants, and that the assault was the consequence of such negligence, and under the circumstances not too remote.

A. L. Smith, J. In this case the plaintiff has recovered damages against a railway company for a series of assaults committed upon him by fellow-passengers whilst travelling upon the defendants' line. The mere statement of the case denotes its novelty; but it is insisted that there was evidence which supported the judgment of the learned county court judge; and, so far as it is material, it is as follows: — [The learned judge stated the facts as previously set out]. The cause of action, if any, which the plaintiff had against the defendants was for an act of omission, and this cannot be supported unless the plaintiff can in the first place establish a duty upon the defendants to do that which it is said they have omitted to do. What is the duty of a railway company to its passengers? It arises out of the contract, and must be determined upon the facts known to the contracting parties at the time of the contract. Ordinarily it is the duty of a carrier of passengers arising out of the contract of carriage to carry the passenger upon the contracted journey with due care and diligence, and to afford him reasonable accommodation in that behalf. If the carrier omits to perform either of these duties, he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of an unknown peculiarity then attaching to him. It is said in the present case that the defendant company committed a breach of duty in allowing the carriage in which the plaintiff was travelling to become overcrowded, and that consequently they omitted to supply him with reasonable accommodation, which the House of Lords, in the case of Jackson *v.* Metropolitan Ry. Co., 3 App. Cas. 193, had held to be evidence of negligence — i.e., breach of duty on the defendants' part. Be it so. But the obligation which the defendants undertook when they contracted with the plaintiff was that, if they omitted to supply him with reasonable accommodation, they would be liable for the conse-

quences usually arising therefrom to one of the travelling public — not for consequences which might result to a man who required, whilst travelling, special protection for his safety, and which fact was unknown to the company when they contracted to carry him. To an ordinary passenger the consequences of not supplying reasonable accommodation, which is the breach of duty now set up, is certainly not his being assaulted by an independent tort feasor, which is the sole injury or loss complained of in the present case. The cases put in argument of the company putting a known lunatic, or a known biting dog, or a known leper, or a man known to be drunk and quarrelsome, into a carriage with one of the ordinary travelling public, have no bearing upon the present case, for the consequences likely to arise therefrom would be well known to the company when they contracted to carry the passenger. The consequences likely to arise from putting pitmen to travel with a passenger, at the time of the contract believed to be one of the ordinary travelling public, would not be that the pitmen should break the law and assault their fellow-passenger. This is the difference between the cases. For the reasons above, and I do not say there are not others, the judgment of the county court judge must be reversed, and judgment entered for the defendants, with costs here and below.[1]

FARNSWORTH *v.* GROOT.

Supreme Court of New York, 1827.

[6 *Cow.* 698.]

On error from the Schenectady C. P. Groot sued Farnsworth in a justice's court, in trespass, for obstructing the former in passing a lock on the Erie canal, and recovered $5. On appeal to the Schenectady C. P., Groot recovered $15.

In the latter court it was proved at the trial that Groot had arrived at the lock before Farnsworth, both passing west. It was regularly Groot's turn to pass the lock, which was not more than a quarter empty when Farnsworth arrived. Groot commanded a freight boat, and Farnsworth a packet boat. Farnsworth, on coming up, asked permission of Groot to pass first, which Groot refused. Farnsworth then demanded it as a right. On being refused, he ordered his hands to push back Groot's boat, which, on seeing the packet boat approaching, the latter had hauled up into the jaws of the lock. The boats were thus both wedged into the lock. Farnsworth's hands attempted to push back Groot's boat, but it was held fast by his hands. This was substantially the case, as made out by Groot, the plaintiff below. According to the defendant's witnesses, he (the defendant below) gave no orders to in-

[1] *Compare:* Chicago & Alton R. R. *v.* Reesbury, 123 Ill. 9. — Ed.

terfere with Groot's boat; but it was some of the passengers who pushed the boat. After about half an hour's detention, the defendant below ordered his boat back, and the plaintiff below passed first.

The court below denied a motion for a non-suit, at the close of the plaintiff's testimony; and after the defendant had closed his case, decided that his matters of defence were insufficient; and so instructed the jury, who found for the plaintiff below.

The defendant below excepted; and the cause came here on the record and bill of exceptions.

Curia, per SAVAGE, C. J. It is important, first, to ascertain the relative rights of the parties. By the fourth section of the act for the maintenance and protection of the Erie and Champlain canals, and the works connected therewith, passed April 13, 1820 (sess. 43, c. 202), it is, among other things, enacted that, "if there shall be more boats, or other floating things, than one below, and one above any lock, at the same time, within the distance aforesaid (100 yards), such boats and other floating things shall go up and come down through such lock by turns as aforesaid, until they shall have passed the same; in order that one lock full of water may serve two boats or other floating things." By the tenth section (p. 186), it is enacted, "that, in all cases in which a boat, intended and used chiefly for the carriage of persons and their baggage, shall overtake any boat, or other floating thing, not intended or used chiefly for such purpose, it shall be the duty of the boatman, or person having charge of the latter, to give the former every practicable facility for passing; and, whenever it shall become necessary for that purpose, to stop, until such boat for the carriage of passengers shall have fully passed." And a penalty of $10 is imposed for a violation of this duty.

It was evidently the intention of the legislature, that packet boats should not be detained by freight boats; as it was known that the packets would move faster than the freight boats; and, in the language of the act, every facility was intended to be afforded them. But the right of passing when both are in motion might be of little use if the packets must be detained at every lock until all the freight boats there have passed before it. The fair construction of the act undoubtedly is, that the packets shall have a preference on any part of the canal; and, to be of any use, this right must exist at the locks as well as on any other part of the canal.

In my judgment, therefore, the defendant below had the right of entering the lock first, and the plaintiff below was the aggressor in attempting to obstruct the exercise of that right. Did the defendant, then, do more than he lawfully might in endeavoring to enforce his rights? No breach of the peace is pretended. No injury to the boat was done. The plaintiff below was detained, and so was the defendant; but the detention was occasioned by the fault and misconduct of the plaintiff himself. What right, under this view of the subject, has the plaintiff below to complain? The defendant below was the injured

party. The plaintiff below was indeed liable to a penalty; but that could not prevent the defendant below from using proper means to propel his boat, and to remove the obstruction caused by the plaintiff below. Suppose, in any part of the canal, the defendant below had overtaken the plaintiff below, and the latter had refused to permit the former to pass, and had placed his boat across the canal, would not the defendant below have been justified in attempting to remove the obstruction, without injury or breach of the peace? This, I presume, will not be denied. The defendant below has done no more. I think, therefore, the court below erred in refusing to instruct the jury that the plaintiff was not entitled to recover; and the judgment should be reversed. *Judgment reversed.*[1]

TIERNEY *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1879.

[76 *N. Y.* 305.[2]]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. Mem. of decision below, 10 Hun, 569.

This action was brought to recover damages to a car load of cabbages, delivered to defendant for transportation, alleged to have been sustained through the negligence of the defendant in not forwarding in due time.

DANFORTH, J. On receiving the cabbages in question and payment of freight, the defendants were bound to forward them immediately to their destination, — such was the duty of a carrier of goods at common law, for if he had not the means of transportation he might refuse to receive the goods, and such is the duty of a railroad corporation. This is so under the statute. By its terms the corporation is required to furnish "accommodations" only for such property as shall be offered a reasonable time before the arrival of the time fixed by public notice for the starting of its trains. Laws of 1850, chap. 140, § 36. And in the absence of a legal excuse the carrier is answerable for any delay beyond the time ordinarily required for transportation by the kind of conveyance which he uses. Blackstock *v.* N. Y. & Erie R. R. Co., 20 N. Y. 48; Mann *v.* Burchard, 40 Vt. 326; Illinois C. R. R. Co. *v.* McClennan, 54 Ill. 58.

None of the exceptions to the charge were well taken. The learned

[1] *Compare:* Briddon *v.* R. R., 28 L. J. (N. S.) Ex. 51; Heilliwell *v.* R. R., 7 Fed. 68; Johnson *v.* R. R., 90 Ga. 810; Galena Co. *v.* Rae, 18 Ill. 488; Selver *v.* Hall, 2 Mo. App. 557; Express Co. *v.* Smith, 33 Oh. St. 511; R. R. *v.* Nelson, 1 Cold. 272. — ED.

[2] This case is abridged. — ED.

trial judge instructed the jury "that it was the duty of the defendant to transport the property in question to New York by the first train, unless a reasonable and proper excuse for the delay is shown." To this there was an exception; "and in case there was a pressure of freight cars, the car in question should be forwarded before forwarding ordinary non-perishable property." "They made this contract in regard to perishable property, and it was their duty to forward it by the first train, unless there was such a pressure upon them of property of a similar kind to be transported, and which had arrived before this, to make it impossible," and again he says, "it would be a good excuse if there was a pressure of a similar kind of property to be forwarded, but it would not be an excuse if there was a pressure of other non-perishable property to be forwarded." To this defendant excepted.

The defendant's counsel requested the judge to charge "that defendant is not liable for delay, if such delay was caused by an unusual press of business, and an accumulation of cars beyond the ordinary capacity of the road," and the judge replied, "within the limitations I have now given, I so charge" — to this qualification there was an exception. It will be seen that the attention of the trial court was not called to the question of right of priority to transportation among freights received at different times. The whole charge is applicable to property received at the same time, and does not necessarily, nor by any fair implication, direct a discrimination in favor of perishable property received after non-perishable; no request to charge in regard to it was made; the testimony did not indicate when the property was received which was sent forward on the 8th and on the 9th before 3.20 in the afternoon. The plaintiff's car left Albany at seven, and to make the question available to the defendant the judge should have been asked to direct the jury in regard to it. Elwood *v.* W. U. Tel. Co., 45 N. Y. 549. I do not think that the question is before us, nor indeed that the evidence was sufficient to raise it in the trial court. The case as presented is that of freight at East Albany; when it, except that of the plaintiff's, reached there does not appear. It was all in the possession and control of the defendant at one and the same time. But if the charge of the trial judge is construed as instructing the jury that the pressure of non-perishable property should not excuse the delay, I am of the opinion that he was right, and the principle of law enunciated by him sound. Wibert's Case, *supra*, is not to the contrary. There the question was not presented as to the duty of a carrier to discriminate in favor of perishable freight over non-perishable. That decision, therefore, should not control this case. It is itself placed upon a qualification to the peremptory direction of the statute, and while it should be followed in similar cases, is not to be extended. The distinction suggested by the charge exists. In Cope *v.* Cordova, 1 Rawle, 203, the court, while holding that the liability of the carrier by vessel ceases when he lands the goods at a proper wharf, adds, "it is beside the question to say that perishable articles may be landed at improper

times to the great damage of the consignee, — when such special cases arise they will be decided on their own circumstances." Such a case was presented to this court in McAndrew *v.* Whitlock, 52 N. Y. 40, where a carrier was held liable for the loss of certain perishable property, licorice, under circumstances which would have exonerated him from liability if it had not been perishable. In Marshall *v.* N. Y. C. R. R. Co., 45 Barb. 502 (affirmed by this court, 48 N. Y. 660), it was held by the Supreme Court that where two kinds of property, one perishable and the other not, are delivered to a carrier at the same time by different owners for transportation and he is unable to carry all the property, he may give preference, and it is his duty to do so, to that which is perishable. In this court the case turned upon other points; but referring to the rule above stated, Hunt, J., says: "The principle laid down is a sound one, and in a proper case would I think be held to be the law. It is not here important."

The rule is a correct one and is equally applicable to the duty of the carrier in whose hands freight has so accumulated that he must give priority to one kind over another.

In requiring the defendant to receive all kinds of property, including perishable, the statute may be construed as imposing upon it such obligations and duties as are required for the proper and safe carriage of that kind of goods. In that respect assimilating a railway corporation to a common carrier, bound by the obligations of the common law to carry safely and immediately the goods intrusted to him, — having in the exercise of care, speed, and priority of transportation, some reference to the natural qualities of the article and the effect upon it of exposure to the elements. McAndrew *v.* Whitlock, 52 N. Y. 40; Marshall *v.* N. Y. C. R. R. Co., 48 N. Y. 660; Peet *v.* Chicago & N. W. R. R Co., 20 Wis. 594. We may also take into consideration the fact that the freight in question was not only perishable but was known to be so by both parties and was shipped as such and with knowledge on the plaintiff's part of the custom of the defendant to give a preference in transportation to such goods, and the parties, though silent, may be regarded as adopting the custom as part of the contract. Cooper *v.* Kane, 19 Wend. 386; Peet *v.* Chicago & N. W. R. R. Co., 20 Wis. 598.[1]

[1] *Compare:* R. R. *v.* Bonand, 58 Ga. 180; Van Horn *v.* Templeton, 11 La. Ann. 52; Hoadley *v.* Transportation Co., 115 Mass. 304; Branch *v.* R. R., 77 N. C. 347; Weed *v.* R. R., 17 N. Y. 362; Peet *v.* R. R., 20 Wis. 594. — Ed.

COUPLAND *v.* HOUSATONIC RAILROAD CO.

SUPREME COURT OF CONNECTICUT, 1892.

[61 *Conn.* 531.[1]]

ACTION to recover the value of a mare and colt injured while being transported by the defendant railroad company; brought to the Superior Court in New Haven County.

The complaint alleged as follows: That on the 25th day of April, 1889, the plaintiff was the owner of a valuable mare and colt, the mare being then worth the sum of $2,000, and the colt the sum of $500; that said mare was on that day at Great Barrington in the State of Massachusetts; that the defendant was then and still is a common carrier by railroad, operating a line of railroad from said Great Barrington to the town of Danbury in this State; that on said day the defendant undertook, as a common carrier, for a valuable consideration received of the plaintiff, to transport said mare and colt over the line of its railroad from said Great Barrington to said Danbury; and that the plaintiff by his agent delivered said mare to the defendant at said Great Barrington, and the defendant received the same on board of a box freight car. The complaint then averred the unsuitableness of the car, as being of insufficient height and without partitions, by reason of which the mare hit her head violently against the roof, and became greatly excited, and finally, by a sudden side movement of the car, was thrown down and her leg broken, by reason of all which she soon after died; and the colt, being newly foaled, died also. It also averred that the plaintiff's agent, soon after the train started, finding that the mare was in great danger of injury, requested the conductor to leave the car upon a side track at a station they were about to stop at, but that he refused to do so.

The case was tried to the jury, before F. B. HALL, J., and a verdict rendered for the plaintiff. The defendant appealed on the ground of error in the charge and rulings of the court. The case is fully stated in the opinion.

SEYMOUR, J. . . . The defendant was bound to furnish a suitable car for the transportation of horses. It was still the duty of the jury to inquire whether it did so. If the box car was unsuitable for the transportation of ordinary horses of the value placed by the plaintiff's agent on these, then the defendant might be liable though it informed the plaintiff of its better accommodations for a higher price. But if the jury found that the box car was suitable for the ordinary business of transporting horses, though lower between joints than the special cars furnished at a higher price, that the plaintiff was aware of such defects and was informed about such special cars, and the additional price

[1] This case is abridged. — ED.

charged for them was not unreasonable, and that, thereupon, he attempted to guard against the possible effect of the lower space and acquiesced in the use of the car which was used, then it was competent for them to further find, from such facts alone, that the plaintiff assumed the risks incident to the defect in question. We think the defendant was entitled to a charge to that effect, and that the instructions given were too restrictive in this particular.

The next reason for appeal is that the court charged "that if, in the course of transportation of the animals, the agents of the defendant in charge of the train were apprised or informed by the plaintiff's agent that the transportation was causing fright to the mare, whereby she was acting badly and was in danger of being killed or hurt by further transportation, and if the defendant's agents were requested by the plaintiff's agent to set the car on the side track at Ashley Falls, to prevent further danger to the mare, it was the duty of the defendant's agents so to do if it could reasonably have been done, and the neglect to do so would have been negligence on the part of the defendant." What actually occurred between the agents of the respective parties in this behalf was a matter of dispute which was left to the jury to decide.

The charge was correct. Most of the objections urged against it are answered by the limitation stated by the court, and it was the defendant's duty to have complied with the requests "if it could reasonably have been done." The charge was appropriate to the facts as claimed by the plaintiff. *New trial ordered.*[1]

DAVIS *v.* GARRETT.

Common Pleas, 1830.

[6 *Bing.* 716.[2]]

Tindal, C. J. There are two points for the determination of the court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught

[1] *Compare:* Nunn *v.* R. R., 71 Ga. 710; Raben *v.* R. R., 73 Ia. 579; Sevier *v.* R. R., 61 Miss. 8; Hunt *v.* R. R., 94 Mo. 255. — Ed.

[2] Only the opinion is printed. — Ed.

fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker *v.* James, 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of Max *v.* Roberts. The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged, that the defendant had and received the

lime in and on board of his barge to be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned lord, in giving the judgment in that case, viz., that there is no allegation in the declaration that there was an undertaking to carry directly to Waterford, it is to be observed, that this is mentioned as an additional ground for the judgment of the court, after one, in which it may fairly be inferred from the language of the chief justice that all the judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the court. And at all events, we think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words "usual and customary" being added to the word direct, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that of her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff. *Rule discharged.*[1]

[1] *Compare:* Express Co. *v.* Kounk, 8 Wall. 342; Phillips *v.* Brigham, 76 Ill. 520; R. R. *v.* Kelley, 125 Pa. St. 620; Church *v.* R. R., 6 S. D. 235; R. R. *v.* Allison, 59 Tex. 193. — Ed.

BALLENTINE *v.* NORTH MISSOURI RAILROAD CO.

SUPREME COURT OF MISSOURI, 1886.

[40 *Mo.* 491.[1]]

FAGG, J., delivered the opinion of the court.

The law defining and regulating the duties of railroad companies as common carriers, is so well settled now as to admit of little doubt or controversy. As preliminary, however, to the determination of the questions involved in this case, it may be stated that the laws of the State require each railroad corporation to "furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation," &c. R. C. 1855, p. 435, § 44. The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered. Galena & Chicago R. R. Co. *v.* Rae *et al.*, 18 Ill. 488; Weibert *v.* N. Y. & Erie R. R. Co., 19 Barb. 36. Any other construction of the statute would be unjust to the railroad companies without benefiting the public.

It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then, must be understood in reference to each particular station, and not to the operation of the road as a whole.

Whilst it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations

[1] This case is abridged. — ED.

for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. Its duty is to receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, to transport the same to any other point on the line of its road that may be designated by the owner or other person having charge of it. This duty to the public must be performed in good faith, and without partiality or favor to any one. Every individual in the community, by complying with the prescribed rules and regulations of the company, has an equal right to demand the performance of this duty, and the law does not excuse a discrimination in this respect any more than it does a discrimination in favor of any particular station on the line of its road. In every proceeding, therefore, against a railroad company for neglect of its duty, either in receiving or shipping freight in the order in which it is offered, the good faith of its conduct in the matter complained of is a proper subject of inquiry, and if found to be wanting, should receive the severest condemnation and censure from the courts of the country.[1]

AYRES *v.* CHICAGO AND NORTHWESTERN RAILWAY.

SUPREME COURT OF WISCONSIN, 1888.

[71 *Wis.* 372: 37 *N. W.* 432.]

THE amended complaint is to the effect that the defendant, being a common carrier engaged in the transportation of live stock, and accustomed to furnish cars for all live stock offered, was notified by the plaintiffs, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station La Valle, and three at its station Reedsburg, ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done

[1] Helliwell *v.* Grand Trunk, 17 Fed. 68; Chicago Co. *v.* Fisher, 31 Ill. App. 36; Deming *v.* Grand Trunk, 48 N. H 155; Tennessee R. R. *v.* Nelson, 1 Cold. 272; R. R. *v.* Nicholson, 61 Tex. 491. — ED.

so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700.[1]

Cassoday, J. We are forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson *v.* C. & N. W. R. Co., 61 Wis. 601, and is supported by the logic of numerous cases. North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Moulton *v.* St. P., M. & M. R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Lindsley *v.* C., M. & St. P. R. Co., 36 Minn. 539; Evans *v.* F. R. Co., 111 Mass. 142; Kimball *v.* R. & B. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford *v.* Smith, 52 N. H. 355; Clarke *v.* R. & S. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; South & N. A. R. Co. *v.* Henlein, 52 Ala. 606; Baker *v.* L. & N. R. Co., 10 Lea, 304, 16 Am. & Eng. R. Cas. 149; Philadelphia W. & B. R. Co. *v.* Lehman, 56 Md. 209; McFadden *v.* M. P. R. Co., 92 Mo. 343; 3 Am. & Eng. Cyclop. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of *any* description, *but his obligation is to carry according to his public profession.*" Johnson *v.* Midland R. Co., 4 Exch. 372. Being a common carrier of live stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier. Texas & P. R. Co. *v.* Nicholson, 61 Tex. 491; Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613; Ballentine *v.* N. M. R. Co, 40 Mo. 491; Guinn *v.* W., St. L. & P. R. Co., 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been suf-

[1] The statement of facts and part of the opinion are omitted. — Ed.

ficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different States. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler *v.* State, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412; Noonan *v.* Ilsley, 21 Wis. 144; Great Western R. Co. *v.* Bacon, 30 Ill. 352; Brown *v.* Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination and might have been emptied with

reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did — to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest errror, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the Court. — Ordered accordingly.

PEOPLE *v.* CHICAGO AND ALTON RAILROAD.

SUPREME COURT OF ILLINOIS, 1889.

[130 *Ill.* 175: 22 *N. E.* 857.]

BAILEY, J. This was a petition for a *mandamus*, brought by the people of the state of Illinois, on the relation of the attorney-general, against the Chicago & Alton Railroad Company, to compel said company to establish and maintain a station for the receipt and discharge of passengers and freight at Upper Alton, in Madison County. . . .

There is, so far as we have been able to discover, no provision of any statute which can be appealed to in support of the prayer of the petition. Neither in the defendant's charter nor in any other act of the general assembly does there seem to be any attempt to prescribe the rules by which the defendant is to be governed in the location of its freight and passenger stations, or to confer upon the Circuit Court the power to interpose and direct as to their location. It is plain that the act of 1877, the only one to which we are referred in this connection, can have no application. That act provides "that all railroad companies in this state, carrying passengers or freight, shall, and they are hereby required to, build and maintain depots for the comfort of passengers, and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their roads having a population of five hundred or more." 2 Starr & C. St. 1924. While it is true that Upper Alton is a town having a population of more than 500, it affirmatively appears that it is not a place where the defendant has been in the practice of receiving and delivering passengers and freight, and so is not within the provisions of said act. The petition seeks to have the defendant compelled to establish a station where none has heretofore existed, while the statute merely requires the erection of suitable depot buildings at places where the railway company has already located its stations, and is in the practice of receiving and discharging passengers and freight. In point of fact, the attorney-general, in his argument upon the rehearing, admits that there is no statute upon which his prayer for a *mandamus* can be based; the position now taken by him being that upon the facts alleged in the petition and admitted by the demurrer, the legal duty on the part of the defendant to establish a freight and passenger station on its line of railway in the town of Upper Alton arises by virtue of the principles of the common law.

It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such. This doctrine has been repeatedly announced by this and other courts. Thus, in Marsh *v.* Railroad Co., 64 Ill. 414, which was a bill for the specific performance of a contract by which the railway company agreed to locate its passenger and freight depots at a particular point in a certain town, and at no other point in said town,

we said: "This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity; the general welfare being largely dependent upon these modes of intercommunication, and the manner of carrying on their operations." In the same case, in holding that the contract there in question ought not to be specifically enforced, we further said: "Railroad companies, in order to fulfil one of the ends of their creation, — the promotion of the public welfare, — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require."

In Railway Co. *v.* People, 120 Ill. 200, which was a petition for a *mandamus* to compel the railway company to repair, generally, a certain portion of its road, and to increase its passenger trains thereon, we said: "There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair, and in a safe condition. Nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. . . . The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road; hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted."

It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points, and in such manner, as to subserve the public necessities and convenience that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void. Railroad Co. *v.* Mathers, 71 Ill. 592; Railroad Co. *v.* Mathers, 104 Ill. 257; Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Railroad Co. *v.* Ryan, 11 Kas. 602; Railroad Co. *v.* Seely, 45 Mo. 212; Holladay *v.* Patterson, 5 Or. 177; Tayl. Corp. § 162, and authorities cited.

We have now to consider whether in the light of the principles above laid down, a right to the relief prayed for is sufficiently shown by the petition. There can be no doubt that the act sought to be enforced (the establishment and maintenance of a freight and passenger station on the defendant's line of railway at a convenient point within the town of Upper Alton) is sufficiently specific to be enforced by *mandamus;* and it only remains to be seen whether the right to

have its performance enforced is shown to be clear and undoubted. It should be observed that there is no controversy as to the facts; the allegations of the petition being, for all the purposes of this appeal, conclusively admitted by the demurrer.

The petition undertakes to show the public importance and necessity of the station asked for in two ways: *First*, by alleging the facts and circumstances which tend to prove it; and, *secondly*, by directly averring it. It cannot be doubted, we think, that the facts alleged make out a clear and strong case of public necessity. They show that Upper Alton is a town of over 1,800 inhabitants, situated on the line of the defendant's railway about midway between two other stations seven miles apart. The residents of the town and vicinity are shown to be possessed of at least the ordinary inclination to travel by railway, and it is averred that many of them have occasion and desire to travel by the defendant's railway between Upper Alton and other points on the line of said railway. Various manufacturing and other business enterprises are shown to be carried on within the town, creating a necessity for the use of said railway for the transportation of manufactured articles, merchandise, and other freights. To avail themselves of transportation upon trains which pass by their doors, the inhabitants of Upper Alton are compelled to go and transport their freights by other conveyances to a neighboring town about three and one-half miles away. Then, as we have already said, the petition directly avers, and the demurrer admits, that the accommodation of the public living in and near said town requires, and long has required, the establishment of a passenger and freight depot on the line of its road within said town. Unless, then, there is some explanation for the course pursued by the defendant which the record does not give, we cannot escape the conviction that its conduct in the premises exhibits an entire want of good faith in its efforts to perform its public functions as a common carrier, and an unwarrantable disregard of the public interests and necessities. It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations extends so far as to justify such manifest and admitted disregard of its duties to the public.

We are of the opinion that the petition shows a clear and undoubted right on the part of the public to the establishment and maintenance of a freight and passenger station on the line of the defendant's railway in the town of Upper Alton, and it therefore follows that the demurrer to the petition should have been overruled.

MOBILE & OHIO RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1890.

[132 *Ill.* 559 : 24 *N. E.* 643.]

SCHOLFIELD, J.[1] Railway stations for the receipt and discharge of passengers and freight are for the mutual profit and convenience of the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must, manifestly, rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point where the welfare of the company and the country in general require that it should be changed to some other point. And so we have held that a railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Marsh *v.* Railroad Co., 64 Ill. 414; Railroad Co. *v.* Mathers, 71 Ill. 592; Same Case again in 104 Ill. 257; Snell *v.* Pells, 113 Ill. 145. The power of election in the location of the line of the railway referred to in People *v.* Louisville & N. R. Co., 120 Ill. 48, results from the franchise granted by the charter to exercise the right of eminent domain, and is therefore totally different from the power of locating stations, which, from its very nature, is a continuing one. And so we said in Marsh *v.* Railroad Co., *supra*, where a bill had been filed for the specific performance of a contract to locate and maintain a station at a particular part: "Railroad companies, in order to fulfil one of the ends of their creation — the promotion of the public welfare — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." And so, again, we said in Railroad Co. *v.* Mathers, *supra:* "Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it." And in the very recent case of People *v.* Chicago & A. R. Co., 130 Ill. 175, where we awarded a *mandamus* commanding the location and

[1] Part of the opinion only is given. — ED.

maintaining of a station at a point where no station had before been located and maintained, we said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public."

The rule has been so often announced by this court that it is unnecessary to cite the cases; that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. The burden was on the relator to prove a case authorizing the issuing of the writ, and in our opinion that proof has not been made. . . . The judgment of the Circuit Court is reversed, and the cause is remanded to that court with direction to enter judgment for the respondent.

NORTHERN PACIFIC RAILROAD *v.* WASHINGTON.

SUPREME COURT OF THE UNITED STATES, 1892.

[142 *U. S.* 492.]

A petition in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the territory, was filed in the District Court of the fourth judicial district of the territory on February 20, 1885, for a *mandamus* to compel the Northern Pacific Railroad Company to erect and maintain a station at Yakima City, on the Cascade branch of its railroad, extending from Pasco Junction, on the Columbia River, up the valley of the Yakima River and through the county of Yakima, towards Puget Sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.[1]

Mr. JUSTICE GRAY, after stating the case as above, delivered the opinion of the Court.

A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in Railroad *v.* Hall, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by *mandamus*. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in

[1] Part of the statement of the case is omitted. — ED.

State *v.* Railroad, 29 Conn. 538), and it has so constructed its road and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. Railway *v.* Mississippi, 112 U. S. 12; People *v.* Railroad, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point when it would not be remunerative. Railway Co. *v.* Queen, 1 El. & Bl. 858; Id. 874; Com. *v.* Railroad, 12 Gray, 180; State *v.* Railroad, 18 Minn. 40.

The difficulties in the way of issuing a *mandamus* to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct, and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road, and vesting it with "all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth," enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road," is significant.

To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of *mandamus*, would be inconsistent with many decisions of high authority in analogous cases.

The constitution of Colorado, of 1876, art. 15, § 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Section 6 of the same article was as follows: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing car or motive power." The General Laws of Colorado, of 1877, c. 19, § 111, authorized every railroad company "to cross, intersect, or connect its railways with any other railway," "to receive and convey persons and property on its railway," and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway." This court held that section 6 of article 15 of the constitution of Colorado was only declaratory of the common law; that the right secured by section 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Chief Justice WAITE, in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there because it has established joint depot accommodations and provided facilities for doing a connecting busi-

ness with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 681, 682.

The Court of Appeals of New York, in a very recent case, refused to grant a *mandamus* to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge Danforth, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station-houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary and convenient buildings and stations "for the accommodation and use of their passengers, freight, and business," and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house, nor the enlargement of one." "As to that, the

statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character; nor can it by any fair or reasonable construction be implied." People *v.* Railroad, 104 N. Y. 58, 66, 67.

In Com. *v.* Railroad, the Supreme Judicial Court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration, or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference under the clause in question; and on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine, and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle, the Supreme Judicial Court of Maine compelled a railroad corporation to build a station at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the state to make such an order, and to apply to the court to enforce it. Laws Me. 1871, c. 204; Commissioners *v.* Portland & O. R. Co., 63 Me. 270.

In Railway Co. *v.* Commissioners, a railway company was held by Lord Chancellor SELBORNE, Lord Chief Justice COLERIDGE, and Lord Justice BRETT, in the English Court of Appeal, to be under no obliga

tion to establish stations at any particular place or places unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and goods at a station once established and used for the purpose of traffic only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by Act of Parliament. 6 Q. B. Div. 586, 592.

The decision in State *v.* Railroad Co., 17 Neb. 647, cited in the opinion below, proceeded upon the theory (inconsistent with the judgments of this court in Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., and of the Court of Appeals of New York in People *v.* Railroad Co., above stated) that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the Supreme Court of Illinois, though going further than those of most other courts in favor of issuing writs of *mandamus* to railroad corporations, afford no countenance for granting the writ in the case at bar. In People *v.* Railroad Co., 120 Ill. 48, a *mandamus* was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter, and which was a county seat, because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county seat. In People *v.* Railroad Co., 130 Ill. 175, in which a *mandamus* was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must therefore be overruled. The court, at pages 182, 183, of that case, and again in Railroad Co. *v.* People, 132 Ill. 559, 571, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to

its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." Page 570. "The rule has been so often announced by this court that it is unnecessary to cite the cases, that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established." Page 572. And upon these reasons the writ was refused.

Section 691 of the Code of Washington Territory of 1881, following the common law, defines the cases in which a writ of *mandamus* may issue as "to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." By the same code, in *mandamus*, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and, if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. Sections 103, 240, 242, 694, 696; Breemer *v.* Burgess, 2 Wash. T. 290, 296; Gildersleeve *v.* Landon, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further, to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for *mandamus* was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be $8,000, and the expense of maintaining it $150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and

to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City, as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the district court awarded the writ of *mandamus*, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The *mandamus* prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (Attorney-General *v.* Boston, 123 Mass. 460, 479; Code Wash. T. § 2171); and no demand upon the defendant was necessary before applying for the writ. (Com. *v.* Commissioners, 37 Pa. St. 237; State *v.* Board, 38 N. J. Law, 259; Mottu *v.* Primrose, 23 Md. 482; Attorney-General *v.* Boston, 123 Mass. 460, 477).

But upon the facts found and admitted no sufficient case is made for a writ of *mandamus*, even if the court could, under any circumstances, issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent charged against the defendant in the petition is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict; and, before judgment in the district court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a *mandamus* should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in Railway Co. *v.* Queen, already cited, "there is a very great difference between an indictment for not

fulfilling a public duty, and a *mandamus* commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. T. & P. Railway *v.* Marshall, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the territory must be reversed, and the case remanded, with directions to enter judgment for the defendant, dismissing the petition; and, Washington having been admitted into the Union as a state by Act of Congress passed while this writ of error was pending in this court, the mandate will be directed as the nature of the case requires, to the Supreme Court of the state of Washington. Act Feb. 22, 1889, c. 180, §§ 22, 23 (25 St. 682, 683).

Judgment reversed, and mandate accordingly.

Mr. Justice Brewer (with whom concurred Mr. Justice Field and Mr. Justice Harlan), dissenting.

CONCORD AND MONTREAL RAILROAD *v.* BOSTON AND MAINE RAILROAD.

Supreme Court of New Hampshire, 1893.

[67 *N. H.* 465.]

Petition, for the location of a union station at Manchester. All the parties desire the erection of such a station, which, it is conceded, the public good requires; but they are unable to agree upon a location. The defendants claim that the court has no jurisdiction.

Per Curiam. The legislature has not authorized the railroad commissioners to locate railroad stations (P. S., c. 155, §§ 11–23, c. 159, §§ 21, 22), and no other tribunal is directly invested with that power. It is conceded that the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public as well as for their own convenience and advantage. From this concession it necessarily follows that it is the legal duty of the parties to locate, erect, and maintain such a depot as public necessity requires. The fact that they are unable to agree upon a suitable location does not relieve them from that duty; and the question is, whether this obligation is an unenforceable one in the absence of express legislation upon the subject, or whether the right, which each has in the performance of its public function, to locate a union station at a reasonably convenient point cannot be vindicated and enforced by the orders and decrees of this court.

The right of these parties and the public to have the union sta-

tion at Manchester located in the proper place is a legal right, the enforcement of which is not prevented by the circumstance that the remedial power is not conferred upon a tribunal of special and limited jurisdiction. It is a right which can be judicially determined at the trial term upon a petition or bill in equity seeking such relief. The procedure will be such as is considered most appropriate for the work to be done. Walker *v.* Walker, 63 N. H. 321.

Case discharged.[1]

JONES *v.* NEWPORT NEWS & MISSISSIPPI VALLEY CO.

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1895.

[65 *Fed.* 736.[2]]

ACTION by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error.

TAFT, Circuit Judge. Plaintiff bases his claim for damages — First, on the violation of an alleged common-law duty; and, second, on the breach of a contract.

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

In Northern Pac. Ry. Co. *v.* Washington, 142 U. S. 492, it was held that a *mandamus* would not lie to compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In Com. *v.* Fitchburg R. Co., 12 Gray, 180, it was attempted to compel a railroad company to run regular passenger trains over cer-

[1] *Compare:* R. R. *v.* Commissioners, 6 Q. B. D. 586; P. *v.* R. R., 120 Ill. 48; Commissioners *v.* R. R., 63 Me. 273; P. *v.* R. R., 104 N. Y. 58. — ED.

[2] This case is abridged. — ED.

tain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that *mandamus* would not lie because the maintenance of such facilities was left to the discretion of the directors.[1]

It is true that the foregoing were cases of *mandamus*, and that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at a particular place, a breach of which can give an action for damages. If the directors have a discretion to establish and discontinue public stations, *a fortiori* have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. Railroad Co. *v.* Suffern, 129 Ill. 274. But this is very far from holding that there is any common-law liability to maintain a side track forever

[1] An extract from the opinion in Ry *v.* Washington is omitted. The Court also cited Peo. *v.* N. Y. L. E. & W. R. R., 104 N. Y. 58; Florida, C. & P. R. R. *v.* State, 31 Fla. 482. — Ed.

after it has once been established. The other Illinois cases (Vincent *v.* Railroad Co., 49 Ill. 33; Chicago & N. W. Ry. Co. *v.* People, 56 Ill. 365) may be distinguished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice GRAY'S opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

In Barre R. Co. *v.* Montpelier & W. R. Co., 31 Vt. 1, the question was one of condemnation. The law forbade one railroad company to condemn the line of another road, and the question was whether the side tracks of the railroad company, which, with the consent of the owners of the granite quarry, ran into a quarry in which a great business was done, were the line of the railroad within the meaning of the statute. It was held that they were so far as to impose obligations on and create exemptions in favor of the railroad company operating the side tracks. We may concede, for the purpose of this case, without deciding, that, as long as a railroad company permits a side track to be connected with its main line for the purpose of delivering merchandise in car-load lots to the owner of the side track, the obligation of the railroad company is the same as if it were delivering these cars at its own warehouse, on its own side track. But this we do not conceive to be inconsistent with the right of the directors of the railroad company, exercising their discretion in the conduct of the business of the company for the benefit of the public and the shareholders, to remove a side-track connection.

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, because it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of. . . .

The judgment of the circuit court is affirmed, with costs.

CHICAGO AND NORTHWESTERN RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1870.

[56 *Ill.* 365.]

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago River, north of Kinzie Street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukie divisions of the road, running in a northwesterly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch near Sixteenth Street, which it reaches by a track diverging from the Galena line on the west side of the city. The map indicates a line running north from Sixteenth Street the entire length of West Water Street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren Street.

Under an ordinance of the city, passed August 10, 1858, the Pittsburgh, Fort Wayne, and Chicago Company, and the Chicago, St. Paul, and Fond Du Lac Company (now merged in the Chicago and Northwestern Company) constructed a track on West Water Street, from Van Buren Street north to Kinzie Street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne, and Chicago Company laid the track from Van Buren to Randolph Street, and the Chicago, St. Paul, and Fond Du Lac Company, that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren Street to Kinzie, and do in fact use it in common. The elevator of the relators is situated south of Randolph Street, and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh Company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators, known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie Street; the Munn & Scott on West Water Street, between the elevator of relators and Kinzie Street; the Union and City near Sixteenth Street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago River. The Munn & Scott elevator can be reached only by the line laid on West Water Street, under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water Street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ, that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukie division of respondent's road, thence taken to the track on West Water Street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the drawbridge, with only a single line, four times, and, as averred in the return subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water Street freight coming over that division of the road. The doctrine of the Vincent Case, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term, in the case of The People ex rel. Hempstead *v.* The Chi. & Alton R. R. Company, 55 Ill. 95, but in the last case we have

also held that a railway company cannot be compelled to deliver beyond its own line simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukie divisions, running northwest, and the Galena division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water Street seems to have been laid for the convenience of the Wisconsin and Milwaukie divisions. It would be a harsh and unreasonable application of the rule announced in the Vincent Case, and a great extension of the rule beyond anything said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water Street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain, the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukie divisions of respondent's road, we find a very different state of facts. The track on West Water Street is a direct continuation of the line of the Wisconsin and Milwaukie division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits in explicit terms, that it has an equal interest with the Pittsburgh, Fort Wayne, and Chicago Railroad in the track laid in West Water Street. It also admits its use; and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukie divisions, is, that those divisions connect with the line on West Water Street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the

use of motive power, labor, and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this line on West Water Street, in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage by the fact that they can be reached only by crossing the river.

We presume, however, from the argument that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukie divisions are concerned. They rest the defence on the contracts made between the company and the elevators above named, for exclusive delivery to the latter to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the Supreme Court of the United States, and the Supreme Court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 381; Sanford *v.* Railroad Co., 24 Pa. 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord HOLT, in Coggs *v.* Bernard, 2 Lord Raymond, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel that railway companies are

common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power they take the lands of the citizen against his will, and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit, and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit,

without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in the Vincent Case, in 49 Ill., and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukie divisions of respondent's road. The only difference between this and the Vincent Case is in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a

principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses is a deliberate policy, to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons, for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago, to whom it might be sent and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and nowhere else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is

preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of The City of Chicago *v.* Rumpff, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretence of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. Marriot *v.* L. & S. W. R. R. Co., 1 C. B. (N. S.), 498.

In Gaston *v.* Bristol & Exeter Railroad Company, 6 C. B. (N. S.) 641, it was held, that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In Crouch *v.* The L. & N. W. R. Co., 14 C. B. 254, it was held a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In Sandford *v.* Railroad Company, 24 Pa. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to Rogers' Locomotive Works *v.* Erie R. R. Co., 5 Green, 380, and State *v.* Hartford & N. H. R. Co., 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukie divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion. *Judgment reversed.*

COE *v.* LOUISVILLE & NASHVILLE RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF TENNESSEE, 1880.

[3 *Fed.* 775.]

BAXTER, C. J. The defendant corporation owns the Louisville & Nashville Railroad, and, in virtue of its purchase of the southeastern lease of the Nashville & Decatur, and ownership of a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, controls every railroad centering at Nashville. It has, for many years past, been engaged in carrying such freights as are usually transported by rail, including live stock. Twelve or more years since, when it needed facilities for loading and delivering live stock, the complainants bought a lot contiguous to defendant's depot, in Nashville, at $14,000, and fitted it up as a stock yard, at a cost of $16,000 more. There was no express contract between complainants and defendant in relation to the matter. But it is clear that it was a convenience to defendant's business. By the permission or acquiescence of defendant complainants' yard was connected with defendant's road by appropriate stock gaps and pens, which have been in use by both parties for more

than twelve years: but on the twenty-fifth of March, 1880, the defendant and the Nashville, Chattanooga & St. Louis Railway Company entered into a contract with the Union Stock Yard Company, whereby the said stock-yard company stipulated "to erect, maintain, and keep in good order," etc., "a stock yard in the city of Nashville, on the line of the Nashville, Chattanooga & St. Louis Railway," outside the city limits, and more than a mile from complainants' yard. And the parties of the first part — the railroad companies — among other things, agreed that "they would establish no other stock yard in Nashville," and that they would "deliver, and cause to be delivered, to said party of the second part all live stock shipped over the roads of the parties of the first part, and consigned to the city of Nashville; the parties of the first part hereby agreeing to make this stock yard of the party of the second part their stock depot for said city, and will not deliver at any other point or points of the city, and agree to deliver all live stock shipped to said city of Nashville at the yards of the party of the second part."

In furtherance of this contract, Edward B. Stahlman, defendant's traffic manager, and owner of $5,000 of the capital stock of the stock-yard company, issued the following order, addressed to defendant's agent, dated July 10, 1880: "On the fifteenth inst. there will be opened and ready for business the stock yards erected by the Union Stock Yard Company, at Nashville, Tenn. These yards have every facility for the proper handling and care of live stock, and will be constituted our stock delivery and forwarding depots. Live stock from and after that date consigned to Nashville proper, or destined to any points over our line via Nashville, should be way-billed care of the Union Stock Yards;" and on the twenty-fourth of the same month James Geddes, defendant's superintendent, supplemented the foregoing order with a notice to complainants in the following words: "I am directed by Mr. De Funiak, general manager, to notify you that after the last day of July, 1880, no delivery of stock will be made to you at our platform here, Nashville depot," to wit, the platform, gaps, and pens communicating with complainants' yard, where the defendant had heretofore delivered to them.

Complainants remonstrated against this threatened discrimination against them and their business; but, being unable to induce any change in defendant's avowed policy, filed their bill in which they pray for an injunction to restrain "defendant's agents and officers and servants from interfering with or in any manner disturbing the enjoyment and facilities now accorded to complainants by the said defendant upon its lines of railway, for the transaction of business now carried on by the complainants, and especially from excluding or inhibiting persons from consigning stock to complainants, and from refusing to receive and transport stock from complainants' yard, and from interfering with or in any way disturbing the business of the complainants, and from refusing to permit the complainants to continue their business on the same terms as heretofore." The injunction asked for is both inhibitory and man-

datory; it seeks to prohibit the doing of threatened and alleged wrongful acts, and to compel defendant to continue the facilities and accommodations heretofore accorded by defendant to complainants; and the question is, are complainants entitled, preliminarily, to the relief prayed for, or any part of it?

The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee. But the rule which requires common carriers by land to deliver to the consignee personally at his place of business, has been somewhat relaxed in favor of said roads on the ground that they have no means of delivering beyond their lines; but it was held in Vincent *v.* The Chicago & Alton R. Co., 49 Ill. 33, that at common law, and independent of the statute relied on in the argument, that in cases where a shipment of grain was made to a party having a warehouse on the line of the carrying road, who had provided a connecting track and was ready to receive it, it would be the duty of the railroad company to make a personal delivery of the grain to the consignee at his warehouse; because, say the court, "the common-law rule must be applied, as the necessity of its relaxation" did not exist.

This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided. Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing, and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prosecution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots; and may a railroad company, after encouraging investments in mills, furnaces, and other productive manufacturing enterprises on its line of road, refuse to make personal delivery of the material necessary to their business, at their depots, erected for the purpose, and require them to accept delivery a mile distant, at the depot of and through a rival and competing establishment? Or may such railroad company establish a "Union Coal Yard" in this city, and constitute it its depot for the delivery of coal, and thus impose on all the coal dealers in the city, with whom it has side connec

tions, the labor, expense, and delay of carting their coal supplies from such general delivery to their respective yards? Or may such railroad company, in like manner, discriminate between grain elevators in the same place, — constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate, or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public. By an unjust exercise of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever.

The case in hand is but a sample of what might be done by these corporations if the power claimed in this case is possessed by them. Complainants' stock yard was purchased and fitted up at a heavy outlay of money. It was, at the time, a necessity to defendant's business. By the express agreement or tacit understanding of the parties suitable connections for receiving and delivering stock were made, of which the defendant availed itself for twelve years. But, after thus accepting the benefits of complainants' expenditures, the defendant proposes to sever its connections, withhold further accommodations, decline to receive from or deliver stock at complainants' yard, concentrate its patronage on the Union Stock Yard Company, require all consignors to way-bill their stock to the care of said favored company, and, by this invidious discrimination, compel complainants to carry on their trade through a rival yard, or else abandon their established and lucrative business. The execution of defendant's threat would destroy complainants' business, depreciate their property, and deprive the public of the protection against exorbitant charges which legitimate competition, conducted on equal terms, always insures. Complainants' yard is on defendant's road; it furnishes every needed facility; was purchased and improved in the belief that they would receive the same measure of accommodation extended to others sustaining the same relation to defendant; defendant can receive and discharge stock at complainants' yard as easily and cheaply as it can at the Union Stock Yard Company's yards. Such

delivery is both practicable and convenient, and it is, we think, its legal duty, under the facts of this case, to do so.

But defendant, protesting that the proposed discrimination in favor of the Union Stock Yard Company would, if executed, constitute no wrong of which complainants ought justly to complain, contends, — *first*, that complainants, even supposing the law to be otherwise, have an adequate remedy at law, and therefore cannot have any relief from a court of chancery; and, *second*, that if a chancery court may entertain jurisdiction, no relief in the nature of a mandatory order to compel defendant to continue accommodations to the complainants ought to be made until the final hearing. If such is the law it must be so administered. But we do not concur in this interpretation of the adjudications. Those cited in argument are not, we think, applicable to the facts of this case. Complainants could, in the event defendant carries its threat into execution and withholds the accommodations claimed as their right, sue at law and recover damages for the wrong to be thus inflicted. But they could not, through any process used by courts of law, compel defendant to specifically perform its legal duty in the premises. And this imperfect redress could only be attained through a multiplicity of suits, to be prosecuted at great expense of money and labor; and then, after reaching the end through the harassing delays incident to such litigation, complainants' business would be destroyed, and the Union Stock Yard Company, born of favoritism and fostered by an illegal and unjust discrimination, would be secure in its monopoly. Here an adequate remedy can be administered and a multiplicity of suits avoided.

One other point remains to be noticed. Ought a mandatory order to issue upon this preliminary application? Clearly not, unless the urgency of the case demands it, and the rights of the parties are free from reasonable doubt. The duty which the complainants seek by this suit to enforce is one imposed and defined by law — a duty of which the court has judicial knowledge. The injunction compelling its performance, pending this controversy, can do defendant no harm; whereas a suspension of accommodations would work inevitable and irreparable mischief to complainants. The injunction prayed for will, therefore, be issued.

COVINGTON STOCK-YARDS COMPANY *v.* KEITH.

SUPREME COURT OF THE UNITED STATES, 1891.

[139 *U. S.* 128.]

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 28th of January, 1886, George T. Bliss and Isaac E. Gates instituted in the court below a suit in equity against the Kentucky Central Railroad Company, a corporation of Kentucky, for the foreclosure of a mortgage or deed of trust given to secure the payment of bonds of that company for a large amount; in which suit a receiver was appointed who took possession of the railroad, with authority to operate it until the further order of the court.

The present proceeding was begun on the 18th of June, 1886, by a petition filed in the foreclosure suit by Charles W. Keith, who was engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the city of Covington, Kentucky, over the Kentucky Central Railroad. The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith by the receiver acting under and pursuant to a written agreement made November 19, 1881, between the railroad company and the Covington Stock-Yards Company, a corporation created under the general laws of Kentucky; the yards of the latter company located in Covington, and connected with the railroad tracks in that city, being the only depot of the railway company that was provided with the necessary platforms and chutes for receiving or discharging live stock on and from its trains at that city. The petition alleged that Keith was the proprietor of certain live-stock lots and yards in that city immediately west of those belonging to the Covington Stock-Yards Company, and separated from them by only one street sixty feet in width; that he was provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; and that his lots and yards were used for that purpose subsequently to March 1, 1886, and until, by the direction of the receiver, the platforms connecting them with the railroad were torn up and rendered unfit for use. The prayer of the petitioner was for a rule against the receiver to show cause why he should not deliver to him at some convenient and suitable place outside of the lots or yards of the said Covington Stock-Yards Company free from other than the customary freight charges for transportation, all stock owned by or consigned to him and brought over said road to Covington.

The receiver filed a response to the rule, and an order was entered giving leave to the Covington Stock-Yards Company to file an intervening petition against the railroad company and Keith, and requiring the latter parties to litigate between themselves the question of the

validity of the above agreement of 1881. The Stock-Yards Company filed such a petition, claiming all the rights granted by the agreement referred to, and alleging that it had expended sixty thousand dollars in constructing depots, platforms, and chutes, as required by that agreement.

Referring to that agreement it appears that the Stock-Yards Company stipulated that its yards on the line of the railroad in Covington should be maintained in good order, properly equipped with suitable fencing, feeding-pens, and other customary conveniences for handling and caring for live stock, and to that end it would keep at hand a sufficient number of skilled workmen to perform the operations required of it, and generally to do such labor as is usually provided for in stock yards of the best class, namely, to load and unload and care for "in the best manner all live stock delivered to them by the party of the first part [the railroad company] at their own risk of damage while so doing, and in no event to charge more than sixty cents per car of full loads for loading and sixty cents per car for unloading, and no charges to be made for handling less than full loads, as per way-bills." The Stock-Yards Company also agreed to become liable for those charges, and to collect and pay over to the railroad company, as demanded from time to time, such money as came into its hands, the charges for feeding and caring for live stock not to be more than was charged for similar services and supplies at other stock yards of the country. The railroad company, upon its part, agreed to pay the Stock-Yards Company the above sums for loading and unloading and otherwise acting as its agent in the collection of freights and charges upon such business as was turned over to it by the railroad company; that it would require all cars loaded at yards for shipment South or East to be carefully bedded, which the Stock-Yards Company was to do at the rates usually charged in other yards; that it would make the yards of the Stock-Yards Company its "depot for delivery of all its live stock," during the term of the contract, and not build, "nor allow to be built, on its right of way, any other depot or yards for the reception of live stock." The delivery of stock in cars on switches or sidings provided for the purpose was to be considered a delivery of the stock to the Stock-Yards Company, which, from that time, was to be responsible for the stock to the railroad company. To protect the business of the Stock-Yards Company from damage in case the railroad extended its track over the Ohio River, the railroad company agreed that during the term of the contract the rate of freight from all points on its road and connections should "not be less than five dollars per car more to the Union Yards of Cincinnati than the rate to Covington yards from the same points;" that its business arrangements with any other railroad or transportation line should be subject to this agreement; and that the yards of the Stock-Yards Company "shall be the depot for all live stock received from its connections for Cincinnati or Eastern markets." The agreement by its terms was to remain in force for fifteen years.

In the progress of the cause E. W. Wilson, by consent of parties, was made a co-petitioner and co-respondent with Keith.

By the final decree it was found, ordered, and decreed as follows: "It is the duty and legal obligation of the Kentucky Central Railroad Company, as a common carrier of live stock, to provide suitable and convenient means and facilities for receiving on board its cars all live stock offered for shipment over its road and its connections from the city of Covington, and for the discharge from its cars of all live stock brought over its road to the said city of Covington, free of any charge other than the customary transportation charges to consignors or consignees; and that the said petitioners, Keith and Wilson, live-stock dealers and brokers, doing business at the city of Covington, and proprietors of the Banner Stock-Yards at that place, are entitled to so ship and receive over said road such live stock without being subject to any such additional charges imposed by said receiver, said railroad company, or other person or corporation. The court further finds and decrees that the alleged contract entered into by and between the said railroad company and the said Covington Stock-Yards Company, of date the 19th day of November, 1881, does not entitle the said Stock-Yards Company to impose upon any shipper of live stock over said road, passing such stock through the yards of said company to and from the cars of said railroad company, any charge whatever for such passage. It is stipulated in said contract that said Stock-Yards Company shall establish and maintain suitable yards or pens for receiving, housing, feeding, and caring for live stock, and to receive all such stock, and load and unload the same upon and from the cars of said company transported on or to be transported over said road for a compensation of sixty cents per car load, to be paid by said railroad company for and during the period of fifteen years from the date of said contract, which has not yet expired, while the said railroad company agreed that it would not during said period establish or allow to be established on the line of its road or on its right of way in said city of Covington any other platform or depot than that of said Stock-Yards Company for the receipt or delivery of such live stock. . . . The court doth further find that the general freight depot of the said railroad company in the said city of Covington, at the terminus of its road between Pike and Eighth Streets, is not a suitable or convenient place for the receipt and delivery of live stock brought to the said city or to be shipped therefrom over said road, and neither said railroad company nor said receiver having provided such suitable depot or place therefor, except the yards of said Stock-Yards Company, it is now ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington stock yards all such live stock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stock yards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the

entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live-stock switch of said railroad company north of said stock yards the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform. The said Keith & Wilson shall provide an agent or representative at said platform to receive such cattle as they may be notified by said railroad company or said receiver are to be delivered to them thereat, and they shall give the said railroad company or said receiver reasonable notice of any shipment desired to be made by them from said platform to conform to the departure of live-stock trains on said road."

The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But it is contended that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, for merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company. As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public in the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.

When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which

the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. North Penn. Railroad *v.* Commercial Bank, 123 U. S. 727, 734. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. "But," this court said, in the case just cited, "notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced."[1] The same principle necessarily applies to the receiving of live stock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of

[1] Myrick *v.* Michigan Central Railroad, 107 U. S. 102, 107; Hall & Co. *v.* Renfro, 3 Met. (Ky.) 51, 54; Mynard *v.* Syracuse & Binghamton Railroad, 71 N. Y. 180; Smith *v.* New Haven & Northampton Railroad, 12 Allen, 531, 533; Kimball *v.* Rutland & Burlington Railroad, 26 Vt. 247; South & North Alabama Railroad Company *v.* Henlein, 52 Ala. 606, 613; Wilson *v.* Hamilton, 4 Ohio St. 722, 740; Ayres *v.* Chicago & Northwestern Railroad, 71 Wis. 372, 379, 381; McCoy *v.* K. & D. M. R. Co., 44 Iowa, 424, 426; Maslin *v.* B. & O. R. R. Co., 14 W. Va. 180, 188; St. Louis & Southeastern Railway *v.* Dorman, 72 Ill. 504; Moulton *v.* St. Paul, Minneapolis, &c. Railway, 31 Minn. 85, 87; Kansas Pacific Railway *v.* Nichols, 9 Kas. 235, 248; Clarke *v.* Rochester & Syracuse Railroad, 14 N. Y. 570, 573; Palmer *v.* Grand Junction Railway, 4 M. & W. 749.

its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation.

Decree affirmed.

BUTCHERS' & DROVERS' STOCK-YARD CO. *v.* LOUISVILLE & NASHVILLE RAILROAD.

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1895.

[67 *Fed.* 35]

TAFT, Circuit Judge, delivered the opinion of the court.[1]

This is an action in equity by a stock-yards company for a mandatory injunction to compel a railroad company to build, or to allow to be built, a side track connecting a spur track of the railroad company with the stock yards of the complainant, and there to deliver and receive all cattle consigned to and shipped by the complainant. The defendant answered, and the cause was heard on pleadings and evidence, and resulted in a dismissal of the bill. The complainant appeals. The facts are substantially as follows: The complainant, the Butchers' & Drovers' Stock-Yards Company, was organized under the laws of Tennessee, and entered upon its business in 1889. It has a stock yard within the city limits of the city of Nashville, and near to the business centre thereof. The Louisville & Nashville Railroad Company is a corporation of Kentucky, whose line of railroad extends to and through Nashville from Louisville. In 1890 the city council of the city of Nashville passed an ordinance permitting the defendant company to lay a spur track from its main track along Front Street in said city. . . .

Sidings were laid by the defendant from the spur track to the property of W. G. Bush & Co., Jacob Shaffer, Levi Langham, and the Capitol Electric Company, and others, under contracts made by the railroad company with these parties, in each of which the defendant retained the right to disconnect the siding from the spur track at any time without notice to the other party. The persons or firms with whom these contracts were made were manufacturing firms or coal dealers. They all owned land abutting on Front Street. Complainant is engaged in receiving, feeding, weighing, selling, and shipping live stock for the general public. Its yards are a block away from the defendant's main line. . . . In 1891, after the spur track and the sidings already alluded to had been constructed, the complainant requested the defendant that a siding be so constructed in front of complainant's property as to allow the transportation of live stock to and from its establishment in car-load lots, and that the same facilities for transportation be afforded to it as were enjoyed by Bush & Co. and the others who then had sidings. . . .

Defendant's attorney answered complainant's request, and stated that, inasmuch as the siding proposed appeared to be desired solely for the purpose of receiving and delivering live stock at defendant's yards, and the railroad company had provided a station for this purpose at Nashville, the establishment of another was declined.

[1] Part of the opinion is omitted. — ED.

The stock-yards station referred to was that of the Union Stock-Yards Company, . . . about a mile and a half from the stock yards of the complainant. The evidence in the record, some of which was admitted, and some of which was excluded by the court below, shows that no charge beyond the ordinary charge for transportation is made for the loading and unloading of cattle at the stock yards to the shipper or consignee; that after the cattle have been unloaded, and have not been taken away by the consignee from the yard for two or three hours, they are then turned into the pens of the stock yards, where a charge of two dollars per car for a day or part of a day is made by the stock-yards company for keeping them, until the consignee takes them away. When cattle arrive at night, the usual result is that they are turned into the pens, because the consignee cannot drive them through the streets at night. There was evidence also of a charge of five or ten cents per head by the stock-yards company if, after the cattle have been priced in the Union Yards, they are removed without sale to another stock yard. . . .

It is insisted that the court will not establish a right that may be dissolved at the will of the defendant. The railroad company reserves the right in its contract with Bush to take up the spur track at any time, and therefore it is said that it cannot be compelled to do that for the complainant which it might at once cease to do by taking up the track. This objection is untenable. The gravamen of the charge in the bill is that the railroad company is discriminating against the complainant, and in favor of those to whom sidings from the spur track are permitted, and that it should be granted equal facilities with such persons. The prayer is in form for an injunction against the discrimination. If the spur track is taken up, then all who enjoy it will be placed on an equal footing and at an equal disadvantage. But complainant's claim is that, while others enjoy the spur track, it also should have the same facilities. It is clearly no defense to a charge of discrimination that the facilities furnished the favored person may be withdrawn at the will of the one who grants them.

We are therefore brought to the issue whether or not there is any discrimination between those who have side-track connections on Front Street and the complainant. This depends on two questions: First. Is it a discrimination which can be controlled or restrained by the courts for a railroad company to furnish a side track to one of its customers, and to refuse such accommodation to another similarly situated? Second. Conceding an affirmative answer to the first question, is there such a difference between the facilities demanded by the complainant and those extended to its neighbors on Front Street, in respect of the comparative burdens which must be assumed by the railway company in granting them, as to justify the latter in making the distinction it insists upon?

The first question is one full of difficulty, both at common law, upon the principles of which this case must be decided, and also

under the interstate commerce act. Because we are able to satisfactorily dispose of the case on the second question, we reserve consideration of the first until the case arises which requires it. We are clearly of opinion that, however unjust and unlawful it may be for a railroad company having furnished a side track to one shipper to refuse it to another similarly situated, the difference in this case between the business of the complainant and that of the other abutters upon the spur track is so great as to make the refusal of the railroad company to grant the side track to the complainant entirely reasonable. The difference between the duties of a common carrier in the transportation of live stock and of dead freight has been remarked upon more than once by the Supreme Court of the United States. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727–734; Stock-Yards Co. *v.* Keith, 139 U. S. 128–133. The evidence clearly shows that the delivery of car-load lots of dead freight and the receipt of them by side tracks is much less onerous, and involves much less care and responsibility for the railroad company, than would the receipt of live stock from a private yard by side track. One of the chief reasons why deliveries and shipments of railroad car-load lots by side track are possible and consistent with the conduct of the business of a large trunk line is that the loaded car may stand upon a side track for hours, or even a day, until the railroad company finds it convenient to back its engine down and take it. Such delays are utterly impossible in the proper transportation of car loads of live stock. When they are loaded, they must be moved. The evidence shows that in other respects the supervision of the switching of cattle cars would be much more expensive and troublesome to the railway company than dead freight. Indeed, it hardly needs expert evidence to establish it. There is no ground, therefore, for any charge of unjust discrimination against the defendant railway company as between complainant and the Front Street shippers.

We come now to the charge of discrimination as between the Butchers' & Drovers' Stock-Yards Company and the Union Stock-Yards Company. [The court here stated the case of Stock-Yards Co. *v.* Keith, 139 U. S 128, and quoted at length from the opinion in that case.]

In view of the principles laid down in this case, the complainant has no ground for objection to the arrangement between the Union Stock-Yards Company and the Louisville & Nashville Railroad Company. The latter uses the chutes and yards of the Union Stock-Yards Company to deliver and receive cattle at that point as its station without any yardage charge or fee for the proper loading and unloading of cattle. The evidence wholly fails to support the charge of the bill that the facilities afforded by the Union Stock Yards are not ample for the business of Nashville. The evidence establishes that no charge is made by the Union Stock-Yards Company for two hours after the cattle are delivered from the cars. There is no evidence to

show that it would be unreasonable in the railroad company, were it the owner of the stock yards, to impose a charge for delay of the consignee in taking his cattle beyond two hours after unloading; and, in the absence of such showing, we cannot say that it is unreasonable for the railroad company to permit its agent, the stock-yards company, to make a charge of two dollars per car for turning the cattle into the pens and keeping them there after such a delay. The discrimination averred and sought to be proven by evidence that, after the cattle have been priced in the pen, they cannot be taken to another yard without paying a fee, concerns the business of the stock-yards company, and not that of the railroad company, whose responsibility ends after the cattle are properly delivered or tendered to the consignee. Of course, the railroad company in delivering the cattle to the stock-yards company, to keep until the appearance of the consignee, can incur only a reasonable charge for the keeping of the cattle. More than this, the consignee is not obliged to pay the stock-yards company. If, however, he thereafter chooses to deal with the stock-yards company as a factor or sales agent, and to put a price upon his cattle for sale, the charges then imposed by the regulations of the stock-yards company, in case of a withdrawal of the cattle to another stock yard for sale, are wholly outside the question of discrimination by the railroad company as a common carrier. The contract between the defendants and the Union Company requires rates charged by the latter to be reasonable. There is no attempt in the record to show that the charge for the simple keep of the cattle in the pens is unreasonable or any higher than the railway company itself might charge for such service.

The decree of the court below is affirmed, with costs.[1]

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD *v.* DENVER AND NEW ORLEANS RAILROAD.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 *U. S.* 667.]

THIS was a bill in equity filed by the Denver & New Orleans Railroad Company, a Colorado corporation, owning and operating a railroad in that State between Denver and Pueblo, a distance of about

[1] *Compare:* Walker *v.* Keenan, 73 Fed. 755. — ED.

one hundred and twenty-five miles, against the Atchison, Topeka & Santa Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company, a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Company formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans for Denver business.

It appeared that when the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones.[1]

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver &

[1] Part of the statement of facts is omitted. — Ed.

New Orleans Company erected, at its junction with the Atchison, Topeka & Santa Fé, platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A. T. & S. F. R. R., or reached by either line; that a system of through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company. . . .

Upon this state of facts the Circuit Court entered a decree requiring the Atchison, Topeka & Santa Fé Company to stop all its passenger trains at the platform built by the Denver & New Orleans Company where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Sante Fé Company to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Company was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage

in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Company or any other competitor of the Denver & New Orleans Company for business. In short, the decree, as entered, establishes in detail rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in connection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Company to place the Denver & New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and perhaps the compulsory interchange of cars.

From this decree both companies appealed; the Atchison, Topeka & Santa Fé Company because the bill was not dismissed; and the Denver & New Orleans Company because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Company for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage.

Mr. H. C. Thatcher, *Mr. Charles E. Gast*, *Mr. George R. Peck*, and *Mr. William M. Evarts* for the Atchison, Topeka & Santa Fé Railroad Company.

Mr. E. T. Wells for the Denver & New Orleans Railroad Company.

Mr. Chief Justice Waite delivered the opinion of the court.[1] After reciting the facts in the foregoing language he continued:

The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any

[1] Part of the opinion is omitted. — Ed.

other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Company for itself, and the Atchison, Topeka & Santa Fé Company does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of Colorado, the Denver & New Orleans Company has a constitutional right, which a court of chancery can enforce by a decree for specific performance, to form the same business connection, and make the same traffic arrangement, with the Atchison, Topeka & Santa Fé Company as that company grants to, or makes with, any competing company operating a connected road.

The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of sec. 23 of the charter of the Baltimore & Ohio Railroad Company, given by Maryland on the 28th of February, 1827, Laws of Maryland, 1826, c. 123, which is in these words:

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the State."

At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to put carriages thereon, subject only to the payment of tolls, and to reasonable regulations as to the manner of doing business. *Lake Sup. & Miss. R. R. Co. v. United States*, 93 U. S. 442; but that the word "connect," as

here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Company, and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Maryland Laws of 1832, c. 175, sec. 16. The charter of the Baltimore & Ohio Company was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the States to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was required, the additional requirement was not distinctly stated and defined by the legislature.

Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began at a very early day in the history of railroad construction. As long ago as 1842 a general statute upon the subject was passed in Maine, Stats. of Maine, 1842, c. 9; and in 1854, c. 93, a tribunal was established for determining upon the "terms of connection" and "the rates at which passengers and merchandise coming from the one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their relations have become more and more complicated, statutory regulations have been more frequently adopted, and with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but we have found no case in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies. . . .

To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to wit, the relative rights of the two companies at common law and under the Constitution, as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;

2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and

3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor

2. That companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeko & Santa Fé Company just as any other customer does, and

with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop

at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through

rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande. . . .

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping-places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do with this case as it is now presented. The question here is whether the Denver & New Orleans Company would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to *Dismiss the bill without prejudice.*

ILWACO RAILWAY & NAVIGATION COMPANY *v.* OREGON SHORT LINE & UTAH NORTHERN RAILWAY.

Circuit Court of Appeals, Ninth Circuit, 1893.

[57 *Fed.* 673.]

McKenna, Circuit Judge.[1] The plaintiff contends that defendant, by preventing it from landing its boats at a wharf owned and used by defendant, discriminates against it, contrary to section 3 of the Interstate Commerce Act.

The facts are as follows: —

That prior to the month of August, 1888, the defendant was named the Ilwaco Steam Navigation Company, but in that month it filed supplemental articles of incorporation, changing its name to Ilwaco Railway & Navigation Company, and proceeded to construct a line of railway from a point at or near the town of Ilwaco on the Pacific Ocean, in the State of Washington, to a point on the navigable waters of Shoal Water Bay, in Pacific County. That the construction of said railway was commenced before, but completed after, the filing of said supplemental articles. That prior to the construction of said railroad line the defendant owned and operated a line of steamboats between the town of Astoria, Or., and the town of Ilwaco. That the shores of the Pacific Ocean in that vicinity were popular summer resorts during the months of July and August and the first week of September. That prior to 1888 the Oregon Railway & Navigation Company owned the boats and line between Astoria and Portland, Or., which plaintiff now owns, and carried passengers from Portland to Astoria, which were then transferred to plaintiff's boats, and carried to Ilwaco, from whence they went to the ocean beach in wagons. That in the summer season of the years 1888, 1889, 1890, and 1891 the Oregon Railway & Navigation Company asked and obtained permission to land its passengers on the wharf at Ilwaco, paying a compensation therefor. That complainant only ran its boats during said summer months, and only while people were travelling to said summer resorts. Said town of Portland, Or., is situated on the Willamette River, about 100 miles inland, easterly from the said city of Astoria, which latter city is situated on the left bank of the Columbia River, and about 12 miles inland from the ocean; and the town of Ilwaco is situated on the right bank of the Columbia River, at a part thereof known as "Baker's Bay," and about 15 miles distant, in a northwesterly direction, from said city of Astoria. That in the year 1892 complainant desired the same privileges, but respondent refused. . . .

The defendant company was organized for the purpose of constructing a transportation route from Astoria, Or., to Shoal Water Bay,

[1] Part of the opinion is omitted. — Ed.

Wash. Its means of transportation are steamboats and a railroad. The wharf at Ilwaco makes the connection between them, and the continuity of the route. The act contemplates, we think, independent carriers, capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

We do not think that the cases cited by appellee militate with these views, nor do they justify a railroad company combining with its proper business a business not cognate to it, and discriminating in favor of itself, as it might in counsel's illustration of a combination of a railroad company with the Standard Oil Company, or as illustrated in the cases of Baxendale *v.* Great Western Ry. Co., 1 Railway & Canal Traffic Cas. 202; Same *v.* London & S. W. Ry. Co., Id. 231; and Parkinson *v.* Railway Co., Id. 280. In all these cases the railroad company attempted to discriminate in favor of itself as carrier, separate from its capacity as a railway carrier. We find no difficulty of concurring in these cases, and distinguishing them from the case at bar. It was not to engage in the business of drayman, as Cockburn, C. J., indicates in the first case, that great powers have been given to railway companies, and, if permitted to be so used, might indeed be converted into a means of very grievous oppression. The principle of these cases does not extend to boats owned by railroads, as a part of a continuous line. Nor do we think the case, Indian River Steamboat Co. *v.* East Coast Transp. Co. (Fla.), 10 South. Rep. 480, sustains complainant. It was a case of discrimination. The action was between two competing steamboat companies, in favor of one of which a railroad company had discriminated by leasing its wharf. Both companies were independent of the railroad, and both connecting lines with it. But the court recognized the right of the railroad company and the Indian River Company to build and maintain a wharf, as incidental to their business, saying: "If either company should erect a dock or wharf for its private use, we know of no law to prohibit it." Page 492. The steamboats were competing lines, and the statutes of Florida regulating railroads provided that no common carriers subject to the provisions should "make any unjust discrimination in the receiving of freight from or the delivery of freight to any competing lines of steamboats in this State." The decision, therefore, was sustained by the laws of the State. The reasoning of the court, beyond this, seems to be in conflict with the Express Cases decided by the Supreme Court of the United States. 117 U. S. 29.

It is not clear what complainant claims from the second subdivision of section 3, besides what it claims from the first subdivision. The second subdivision is as follows: —

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper,

and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion, however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate our views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist.

Judgment reversed, and cause remanded for further proceedings.

LITTLE ROCK & MEMPHIS RAILROAD *v.* ST. LOUIS SOUTHWESTERN RAILWAY.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1894.

[63 *Fed.* 775.]

THAYER, Circuit Judge, delivered the opinion of the court.

It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain, & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee: but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the Interstate Commerce Law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not "subject any particular person,

company, corporation, or locality . . . to any undue or unreasonable . . . disadvantage in any respect whatever." This prohibition is very broad, it is true, but it is materially qualified and restricted by the words "undue or unreasonable." One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the Interstate Commerce Law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise. It is most probable that self-interest — the natural desire of all carriers to secure as much patronage as possible — will prevent this species of discrimination from becoming a public grievance so far as individual shippers are concerned; and it is desirable that the courts should interfere as little as possible with those business rivalries existing between railroad corporations themselves, which are not productive of any serious inconvenience to shippers. We think, therefore, that no error was committed in entering the judgment and decree in favor of the St. Louis, Iron Mountain, & Southern Railway Company.

The complaint preferred against the other companies, to wit, the St. Louis Southwestern and the Little Rock & Ft. Smith Railway Companies, is somewhat different. It consists in the alleged refusal of those companies, — first, to honor through tickets and through bills of lading issued by the complainant company, or to enter into arrangements with it for through billing or through rating; and, secondly, in the alleged refusal of these companies to accept loaded cars coming from the Little Rock & Memphis Railroad, and in their action in requiring freight to be rebilled and reloaded at the two connecting points, to wit, Brinkley and Little Rock.

Before discussing the precise issue which arises upon this record it will be well to restate one or two propositions that are supported by high authority as well as persuasive reasons, and which do not seem to be seriously controverted even by the complainant's counsel. In the first place, the interstate commerce law does not require an interstate carrier to treat all other connecting carriers in precisely the

same manner, without reference to its own interests. Some play is given by the act to self-interest. The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are "undue or unreasonable"; and even that clause which requires carriers "to afford all reasonable, proper, and equal facilities for the interchange of traffic" does not require that such "equal facilities" shall be afforded under dissimilar circumstances and conditions. Moreover, the direction "to afford equal facilities for an interchange of traffic" is controlled and limited by the proviso that this clause "shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier." Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 571; Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 473. In the second place, it has been held that neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation. Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R. 1, 16, 17; Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. Ry. Co., 41 Fed. 559, and cases there cited by Judge Caldwell. Furthermore, it has been ruled by Mr. Justice Field in the case of the Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 474, that the third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer. It should be remarked in this connection that the bills on file in the present cases, as well as the petitions in the law cases, fail to disclose whether the offending companies have refused to receive freight in the cars in which it was tendered to them, even when it would injure the freight to transfer it, or when they had no cars of their own that were immediately available to forward it to its destination. Neither do the bills or the petitions disclose whether, in tendering freight in cars to be forwarded, the complainant company demanded the payment of the usual wheelage on the cars, or tendered the use of the same free, for the purpose of forwarding the freight to its destination. The allegations of a refusal to receive freight in cars are exceedingly general, and convey no information on either of the points last mentioned.

As we have before remarked, the several propositions above stated do not seem to be seriously questioned. It is urged, however, in substance, that although the court may be powerless to make and

enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks, and terminal facilities, yet that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend "equal facilities" to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence in determining a railway company to refuse to enter into such an arrangement with any connecting carrier. In view of these considerations, we are unable to adopt a construction of the Interstate Commerce Act which will practically compel a car-

rier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

In two of the cases heretofore cited (Kentucky & I. Bridge Co. v. Louisville & N. R. Co., and Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.), it was held that the charge of undue or unreasonable discrimination cannot be predicated on the fact that a railroad company allows one connecting carrier to make a certain use of its tracks or terminals, which it does not concede to another. This conclusion was reached as the necessary result of the final clause of the third section of the Interstate Commerce Law, above quoted, to the effect that the second paragraph of the third section shall not be so construed as to require a carrier to give the use of its tracks or terminals to another company. Railroads are thus left by the commerce act to exercise practically as full control over their tracks and terminals with reference to other carriers as they exercised at common law. The language of Mr. Justice Field in that behalf was as follows: —

"It follows from this . . . that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated." 51 Fed. 474, 475.

Furthermore, it is the settled construction of the act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have had occasion to consider the subject, and it is based on the fact that, in enacting the commerce act, Congress did not see fit to adopt that provision of the English Railway and Canal Traffic Act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made. Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R., 1, 9, 10; Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 630, 631. See also the second annual report of the Interstate Commerce Commission (2 Interst. Commerce Com. R., 510, 511). In the

light of these adjudications, we are compelled to conclude that, if the charge of an unreasonable discrimination cannot be successfully predicated on the ground that a railway company makes an arrangement with one connecting carrier for the use of its tracks and terminals, which it refuses to make with another although the physical facilities for an interchange of traffic are the same, then the charge of discrimination cannot be predicated on the ground that it makes an arrangement for through billing and rating with one carrier, and does not make it with another. The Interstate Commerce Act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort, and does not give the commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable, and when undesirable. Moreover, arrangements for through billing and rating will, as a general rule, necessarily involve an agreement for the use, to some extent, of each other's terminals and tracks; and, by the express language of the statute, such use cannot be enforced without the consent of the owner. We are unwilling, therefore, as the law now stands, to compel the defendant companies to afford the facilities which the complainant demands.

We are also forced to conclude that if the public interest requires that interstate carriers shall be compelled to put in force arrangements for through billing and rating, and for the establishment of joint through lines, the statute should be made more explicit, and that the commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case.

Some allusion was made in the argument to a provision found in the constitution of the State of Arkansas (article 17, § 1), as having some bearing on the questions discussed in these cases; but as the bills and petitions filed are plainly founded on the Interstate Commerce Law, and thus involve a federal question arising under that act, and as there is no jurisdiction arising from diverse citizenship, we have not felt called upon to consider or decide the proposition founded upon the constitution of the State. In view of what has been said, the several decrees and judgments are hereby affirmed.[1]

[1] *Compare:* Lotsperch *v.* Central R. R. Co., 73 Ala. 306; Snow *v.* Indiana Co., 109 Ind. 422; Dunbar *v.* R. R. Co., 36 S. C. 110. — Ed.

Section III. For Reasonable Compensation.

ANONYMOUS.

Common Pleas, 1494.

[*Y. B.* 10 *H.* 8, *pl.* 14.]

Hussey, C. J., said that a victualler shall be compelled to sell his victual if the vendee has tendered him ready payment, otherwise not. *Quod* Brian, C. J., *affirmavit.*[1]

BASTARD *v.* BASTARD.

King's Bench, 1679.

[2 *Shower*, 81.]

Case against the defendant as a common carrier, for a box delivered to him to be carried to B., and lost by negligence.

Williams moved in arrest of judgment, because there was no particular sum mentioned to be paid or promised for hire, but only *pro mercede rationabili.*

Resolved well enough, and judgment given for the plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire, and he is therefore chargeable for the loss of the goods in the one case as the other.[2]

SKINNER *v.* UPSHAW.

Nisi Prius, 1702.

[2 *Ld. Raym*, 752.]

The plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, &c., and therefore he retained them. And it was

[1] *Compare:* Lewis *v.* New York Central, 49 Barb. 330. — Ed.

[2] *Compare:* Harvey *v.* Grand Trunk Co., 2 Hask. 124; Louisville Co. *v.* Wilson, 119 Ind. 352; Kellerman *v.* Kansas City Co., 136 Mo. 177; Cleveland Co. *v.* Furnace Co., 37 Oh. St. 321. — Ed.

ruled by Holt, Chief Justice at Guildhall (the case being tried before him there), May 12, 1 Ann. Reg. 1702, that a carrier may retain the goods for his hire; and upon direction, the defendant had a verdict given for him.[1]

POTTS *v.* NEW YORK AND NEW ENGLAND RAILROAD CO.

Supreme Court of Massachusetts, 1881.

[131 *Mass.* 455.]

Tort for the conversion of a quantity of coal. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon an agreed statement of facts in substance as follows:

The plaintiff, a coal merchant, sold to a firm in Southbridge in this Commonwealth a large quantity of coal and shipped 205 tons thereof by a schooner to Norwich, Connecticut, to be thence transported by the defendant over its railroad to the consignees at Southbridge. The defendant received the coal at Norwich, paying the water freight to discharge the schooner's lien, amounting to $205, and then carried the coal to Southbridge and delivered to the consignees all but 119 tons thereof, no part of the advances for water freight nor the defendant's freight being paid. On the arrival at Southbridge of the 119 tons, which is the coal in controversy, the consignees having failed, the plaintiff duly stopped it *in transitu*, and demanded it of the defendant. The defendant refused to deliver it, claiming a lien on it for the entire amount of the water freight on the whole cargo paid by the defendant, and for the whole of the defendant's freight on the cargo, amounting in all to $513. The plaintiff tendered to the defendant $297, which was enough to cover the water freight and the defendant's freight on the coal in question. The value of the coal in controversy was $696.

If the defendant had no right to hold the coal as against the plaintiff for the advances and freight on the whole cargo, judgment was to be entered for the plaintiff for $398, with interest from the date of the writ; otherwise, judgment for the defendant.

Gray, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the rest without proof of an intention so to do. Sodergren *v.* Flight, cited in 6 East, 622; Abbott on Shipping (7th ed.), 377; Lane *v.* Old Colony Railroad, 14 Gray, 143; New Haven & Northampton Co. *v.* Campbell, 128 Mass. 104.

[1] *Compare:* Bird *v.* R. R., 72 Ga. 655; Galena Co. *v.* Rae., 18 Ill. 488: Wolf *v.* Hough, 22 Kans. 659; Goodman *v.* Stewart, Wright, 216; Pacific R. R. *v.* U. S., 2 Wyo. 170. — Ed.

And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. Briggs *v.* Boston & Lowell Railroad, 6 Allen, 246, 250.

The right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. Bloxam *v.* Sanders, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406; Rowley *v.* Bigelow, 12 Pick. 307, 313. This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591; see also Butler *v.* Woolcott, 2 N. R. 64; Sears *v.* Wills, 4 Allen, 212, 216. But the common-law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

Judgment for the defendant.[1]

SHINGLEUR *v.* CANTON.

Supreme Court of Mississippi, 1901.

[78 *Miss.* 875.]

Terral, J., delivered the opinion of the court.

The appellant sued the appellee in replevin for fifty-nine bales of cotton, and before suit brought demanded the delivery of the same, and offered to the warehouse company all storage and other charges thereon, amounting to $124.55, upon said cotton. The warehouse company refused the delivery of the cotton unless appellant would pay it the storage and other charges on seventy-nine bales of cotton previously delivered by appellee to appellant, amounting to $162.89. For some reason appellant declined to pay the charges on the previous bailments. It appeared from the evidence that a separate receipt was given for each bale of cotton, and there was no connection between the bailment of the fifty-nine bales of cotton sued for and the prior bailment of the seventy-nine bales of cotton, upon which $162.89 was claimed as charges. A judgment was rendered against appellant for

[1] *Compare:* Westfield *v.* Ry., 52 L. J. Q. B. 276; R. R. *v.* Oil Works, 126 Pa. St. 485; Farrell *v.* R. R., 102 N. C. 390; White *v.* Vann, 6 Humph. 70. — Ed.

the expenses on the seventy-nine bales of cotton, as well as that on the fifty-nine bales sued for. In that respect, it is claimed that the court erred.

1. The contention of the appellee that a warehouse lien is a general lien and gives a right to retain for a balance of accounts relating to similar dealings is not to be maintained. It is a common-law lien, which is the creature of policy, and is a specific or particular lien, which attaches only upon each separate bailment, and is lost when all the articles of each several bailment are delivered to the bailor or his assignee.

2. The contention that a warehouseman, under § 2682, code 1892, has a lien on cotton raised in this State, for storage and other charges connected therewith, is not supported by any reasonable construction of that section.

The cotton here was not in the warehouse to prepare it for market, but was at the market, and was there for sale or shipment, and the charges claimed were incident to the handling of the cotton then in the market. It is not covered, we think, by § 2682.

3. On the delivery of each bale of cotton at the warehouse by the farmer bringing it in for sale, a receipt was given, of the following tenor:

"No. ——. Received of ——— one bale of cotton, in apparent good order. Mark, ——. No., ——. Weight, ——. Remarks, ———.

———, *Manager.*

"Responsible for loss or damage by fire or water. This bale of cotton to be delivered only on this receipt properly indorsed."

It is not denied but that appellant had bought the fifty-nine bales of cotton from the owners, and had received these unindorsed receipts as a symbolical delivery of the bales of cotton; that, as between the bailor and the assignee, the property was intended to be passed to the assignee by the delivery of the unindorsed receipts. The intention of the parties gives effect to their acts as a valid transfer of the property. Allen *v.* Williams, 12 Pick. 297; Bank *v.* Dearborn, 115 Mass. 219; Bank *v.* Ross, 9 Mo. App. 399; Lickbarrow *v.* Mason, Smith's Ldg. Cases (8th ed.), 1209.

However, no objection was made in the court below to the receipts because not indorsed, and the objection comes too late when made here for the first time.

The appellant, upon the case as made by the record, was entitled to recover the fifty-nine bales of cotton the charges on which had been tendered, with all costs.

Reversed and remanded.[1]

[1] *Compare:* Scott *v.* Jester, 13 Ark. 446; Naylor *v.* Mangles, 1 Esp. 109; Lenckart *v.* Cooper, 3 Scott, 521; Steel Co. *v.* R. R. Co., 94 Ga. 636; Hartshorne *v.* Johnson, 2 Halst. 108; Bacharach *v.* Freight Line, 133 Pa. St. 414.—Ed.

WESTERN TRANSPORTATION CO. *v.* HOYT.

COURT OF APPEALS, NEW YORK, 1877.

[69 *N. Y.* 230.[1]]

CHURCH, C. J. The decision in the case of the present plaintiff against Barber, 56 N. Y. 544, disposes of some of the questions involved in this case. That was an action for conversion against the warehouseman for delivering the oats to the defendants, and it was there held that the proper construction of the bill of lading was to give the defendants, who were consignees, three full week days to discharge the cargo, and such reasonable time after that period as the circumstances might require, upon paying the specified demurrage, but that the carrier might terminate this additional privilege or right by a proper notice. It appears in this, as in that case, that notice of the arrival of the boat "Clio" was given to the consignees on Friday, at ten minutes past twelve, and it was not disputed on the trial that when the notice is after twelve o'clock, that day is not to be counted as any part of the three days given absolutely for the discharge of the cargo, and it appeared, and seems not to have been disputed, that the three days would not expire until Tuesday night at twelve o'clock. We held that the act of the carrier in removing his boat, and storing the grain elsewhere, on Tuesday, prior to the expiration of the three days, was wrongful, and amounted to a conversion, and deprived him of his lien for freight. The case was not materially changed in this respect upon the trial of this action. The notice which was claimed to have been given was given on Tuesday morning, to the effect that unless the cargo was discharged on that day the oats would be stored. Such a notice would not relieve the plaintiff from the consequences of his wrongful act in storing the oats, for the reason that the day extended, as was proved, to midnight, and the plaintiff violated the notice by removing the boat several hours previously. He could not by a notice shorten the time fixed by the contract itself. The construction of the bill of lading, the character of the act of the plaintiff in storing the oats, and the effect of the act upon its rights to a lien for freight must be regarded as adjudged and settled in the case referred to.

Other questions are presented upon this appeal which must be considered. About 5,000 of the 14,000 bushels of the oats were removed from the boat by the elevator procured by the defendants, and the remainder were stored in Barber's warehouse. Subsequently the defendants demanded and obtained possession of the oats from Barber upon giving him indemnity against any claim of plaintiff for freight or for the oats. It is urged that the defendants taking possession of the property entitled the plaintiff to the freight. There is some apparent

[1] Only opinion is printed. — ED.

plausibility in equity in this position, but it must be observed that a delivery to the consignees is as much a part of the contract as the transportation. Mr. Angell, in his work on carriers, says: "It is not enough that the goods be carried in safety to the place of delivery, but the carrier must, and without any demand upon him, deliver, and he is not entitled to freight until the contract for a complete delivery is performed." § 282. When the responsibility has begun, it continues until there has been a due delivery by the carrier. Id., note 1, and cases cited. Parsons on Shipping, 220. And in this case, the bill of lading expressly requires the property to be transported and delivered to the consignees. The delivery was as essential to performance as transportation to New York, and it is a substantial part of the contract. The plaintiff might as well, in a legal view, have stopped at Albany, or any other intermediate port, and stored the grain, as to have stored it in Brooklyn. In either case he could not aver a full performance, nor that he was prevented by the defendants from performing. It follows that he cannot recover upon the contract. Performance is a condition precedent to a recovery. As said by Lord Ellenborough in Liddard *v.* Lopes, 10 East, 526, "The parties have entered into a special contract by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract, and that event has not taken place, there has been no such delivery, and consequently the plaintiff is not entitled to recover."

As the plaintiff cannot recover under the contract, if he has any claim for freight it is only for *pro rata* freight, which is sometimes allowed, when the transportation has been interrupted or prevented by stress of weather or other cause. In such a case, if the freighter or his consignee is willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service is rendered, a proportionate amount of freight will be due as "freight *pro rata itineris*." This principle was derived from the marine law, and it is said that the common law presumes a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination, for he obtains his property with the advantage of the carriage thus far. The principle is based upon the idea of a new contract, and not upon the right to recover upon the original contract. The application of this principle has been considerably modified by the courts. In the early case of Luke *v.* Lyde, 2 Burr. 889, a contract was inferred from the fact of acceptance, and the rule was enunciated without qualification that from such fact, without regard to the circumstances, and whether the acceptance was voluntary or from necessity, a new contract to pay *pro rata* freight might be inferred. Some later English cases, and the earlier American cases, apparently followed this rule; but the rule has been in both countries materially modified, and it is now held that taking possession from necessity to save the property from destruction, or in consequence of the wrongful act of the freighter, as in Hunter *v.* Prinsey, 10 East,

394, and in 13 M. & Wels. 229, where the master caused the goods to be sold, or when the carrier refuses to complete the performance of his contract, the carrier is not entitled to any freight. Parke, B., in the last case stated the rule with approval, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with; and Lord Ellenborough, in Hunter *v.* Prinsey, *supra*, said: "The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."

Thompson, C. J., in 15 Jr. 12, said: "If the ship-owner will not or cannot carry on the cargo, the freighter is entitled to receive his goods without paying freight." It is unnecessary to review the authorities. The subject is considered in Angell on Carriers, § 402 to 409, and Abbott on Shipping, 5th Am. ed. 547, and in the notes and numerous cases referred to, and the rule as above stated seems to have been generally adopted by nearly all the recent decisions, and its manifest justice commends itself to our judgment. In this case no inference of a promise to pay *pro rata* or any freight can be drawn. The circumstances strongly repel any such intention. The carrier doubtless acted in accordance with what it believed to be its legal rights, but the act of storing was a refusal to deliver, and as we held in the Barber case, *supra*, a wrongful act amounting to conversion, quite equal in effect to the sale of the goods in the cases cited. The carrier must therefore be regarded as refusing to deliver the oats. Neither the owner nor his consignee intended to waive a full performance or to assume voluntarily to relieve the plaintiff from non-performance. They claimed the possession of the property and the right to possession discharged from all claim for freight, and indemnified the warehouseman against such claim. Every circumstance repels the idea of a promise to pay *pro rata* freight. The case stands, therefore, unembarrassed by the circumstance that the consignee took possession of the property under the circumstances, and it presents the ordinary case of an action on contract where the party seeking to enforce it has not shown a full performance.

The next question is, whether the plaintiff is entitled to freight upon the 5,000 bushels delivered. The contract for freight is an entirety, and this applies as well to a delivery of the whole quantity of goods as to a delivery at all, or as to a full transportation. Parsons on Shipping, 204. There are cases where this rule as to quantity has been qualified, but they have, I think, no application to the present case. The delivery of the 5,000 bushels was made with the understanding and expectation that the whole quantity was to be delivered, and no inference can be drawn of an intention to pay freight in part without a delivery of the whole. The quantity delivered must be regarded as

having been received subject to the delivery of the whole cargo. There was no waiver. The principle involved is analogous to a part delivery from time to time of personal property sold and required to be delivered. If the whole is not delivered, no recovery can be had for that portion delivered. 18 Wend. 187; 13 J. R. 94; 24 N. Y. 317.

The claim for lake and Buffalo charges stands, I think, upon a different footing. These are stated in the bill of lading at $5\frac{3}{4}$ cents a bushel, amounting to $842.38. It must be presumed, as the case appears, that the plaintiff advanced these charges, and if so it became subrogated to the rights of the antecedent carrier. The claim for these charges was complete when the plaintiff received the property to transport, and was not merged in the condition requiring the performance of the contract by the plaintiff to transport the property from Buffalo. That contract was independent of this claim. The bill of lading is for transportation and delivery upon payment of freight and charges; but if the plaintiff had a right to demand any part of the charges independent of the bill of lading, that instrument would not deprive him of such right. We have been referred to no authority making a liability upon such an advance dependent upon the performance of the contract for subsequent carriage. If the action had been by the lake carrier to recover for the freight to Buffalo, it is very clear that the defendants could not have interposed as a defence that the carrier from Buffalo had not performed, and why is not the plaintiff entitled to the same rights in respect to this claim as the former carrier?

I am unable to answer this question satisfactorily as the case now appears.

If these views are correct, a nonsuit was improper, and there must be a new trial with costs to abide event.

All concur, except Allen, J., taking no part, and Andrews, J., absent. *Judgment reversed.*[1]

BURLINGTON AND MISSOURI RIVER RAILROAD CO. *v.* CHICAGO LUMBER CO.

Supreme Court of Nebraska, 1884.

[15 *Neb.* 390.]

Reese, J. This is an action in garnishment commenced in the District Court of Otoe county by the defendant in error, a judgment creditor of one William W. Babbitt, against the plaintiff in error, as a supposed debtor of the said Babbitt.

[1] *Compare:* R. R. *v.* Saunders, 128 Mass. 53; Hurten *v.* Insurance Co., 1 Wash. C. C. 530; Escopinche *v.* Stewart, 2 Conn. 262; Thibault *v.* Russell, 5 Harr. 293; Stevens *v.* Stewart, 69 Mass. 108; Minnesota Co. *v.* Chapman, 2 Ohio St. 207. — Ed.

The answer of the plaintiff in error discloses the fact that at the time of the service of the summons in garnishment it was indebted to the said Babbitt in the sum of $144.51 for overcharges, before that time made, on freight. Said answer discloses the further fact that it had in its possession at said time one hundred and fifty-three tons and fourteen hundred pounds of coal (eleven carloads) consigned to the said Babbitt, and worth, as it alleges, four dollars per ton, amounting to $616.10; but it further alleges that its charges against said coal amount to the sum of $1,029.63, which it itemizes as follows: Freight and back charges, $666.63; demurrage, eighty-five days in car, $330; unloading coal, $33; being $413.52 more than the alleged value of the coal. The plaintiff in error therefore insists it was not indebted to said Babbitt in any amount.

It is shown by the evidence in the trial of the cause that at the time of the unloading of the coal by the plaintiff in error, it converted it to its own use, unloading it into its own bins.

The finding of the District Court was in accordance with the above facts, and judgment was rendered against the plaintiff in error, and in favor of the defendant in error, for the said sum of $144.51. Both parties excepted to the ruling of the court, but the plaintiff in error, only, brings the case into this court by petition in error, alleging that the court erred in rendering judgment against it, for the reason that the judgment is contrary to law, and contrary to and inconsistent with the findings of fact by the court; also in not discharging the plaintiff in error without liability as garnishee.

According to our view of the case, it will not be necessary to examine the alleged errors separately, as we can best present our conclusions by grouping all together. But before doing so it is proper to note the fact that the defendant in error in the course of the trial offered testimony to prove that the coal was worth $8 per ton instead of $4 as claimed by plaintiff in error, but upon objection by plaintiff the offer was overruled by the court and the evidence excluded. This ruling must have been made upon the theory that the whole matter of the eleven carloads of coal should be left out of the question, and the findings of the court upon that subject were not intended in any respect as a basis for the judgment. In this we think the District Court was correct, at least if the court did err it was against the defendant in error and not the plaintiff.

The plaintiff in error concedes in its brief that the freight charges were more than the value of the coal, but seeks to explain that fact by saying "the coal was wrongfully turned in transit from its proper course; it should have come over the Council Bluffs and St. Joe Railroad, and it was turned and went the roundabout way, meeting with several washouts which caused the freight to be more than the coal." This explanation we think will hardly meet the case. We know of no rule of law which will permit railroad companies, as common carriers, to "wrongfully" send freight by a "roundabout" way, instead of over

its direct lines, and thus increase the cost of transportation. While this course might be instrumental in increasing the revenues of the carrier, it would be very injurious to the commerce of the country, which requires not only cheap but direct and rapid transportation.

To these charges for freight was added another burdensome charge, that of demurrage. It is claimed by the plaintiff that this freight was allowed to stand in its cars in all eighty-five days, *i. e.* equivalent to one car that number of days, and for this it charges $330. It is not claimed that this charge was made by virtue of any contract between the shipper and the carrier, nor yet by any statutory enactment permitting it, or by any use or custom which may possibly have acquired the force of law. And we are unable to see how any such charge can be insisted upon in this action. We know of no authority for it, and our attention has been called to none.

In Chicago & North Western Ry. Co. *v.* Jenkins, 103 Ill. 588, it is decided that the right to demurrage does not attach to carriers by railroads. If its exists at all, as a legal right, it exists only as to carriers by sea-going vessels, and is confined to maritime law. As to whether demurrage might be charged in case of a contract to that effect we express no opinion, but that it cannot be allowed in this case we have no doubt.

The charge of $33 for unloading the coal is equally objectionable. The proof shows that the plaintiff in error unloaded the coal into its own bins for its own use. There is no claim that it cost any more to unload this coal than it would had it belonged to the plaintiff in error in the first instance. Why should it charge for doing with this coal the same as it would have had to do with its own ? We can see no reason for such charge, and it should not be allowed.

From the foregoing we are led to the conclusion that the District Court did not err, as against the plaintiff in error in the judgment rendered : that if its judgment was erroneous the defendant in error is the only sufferer thereby, but as it is not seeking any relief at the hands of this court the judgment of the District Court must be affirmed.

The other judges concur.[1] *Judgment affirmed.*

DENVER AND RIO GRANDE RAILROAD CO. *v.* HILL.

SUPREME COURT OF COLORADO, 1889.

[13 *Col.* 35.]

THE appellee, as plaintiff, filed his complaint against the defendant in the court below, alleging ownership and right of possession to certain grain which he claimed was unlawfully taken and wrongfully with-

[1] *Compare :* Crommelin *v.* R. R., 4 Keyes, 190 ; Hunt *v.* Haskell, 24 Me. 339 ; Miller *v.* Mansfield, 112 Mass. 260 ; Clendaniil *v.* Tuckerman, 17 Barb. 184 ; Beckwith *v.* Frisbie, 32 Vt. 559. — ED.

held from him by the defendant after demand. The value of the property was stated to be $400. The defendant denied all the allegations of the complaint and claimed a carrier's lien upon the property for transportation from Denver to Colorado Springs, and also for freight charges advanced to the Union Pacific Railway Company. In his replication the plaintiff denied the defendant's claim for a lien upon the property, and alleged that the owner had directed the goods to be shipped from the city of Denver to their destination over the Denver and New Orleans Railroad, a competing line with that operated by the defendant, and averred that the defendant, well knowing such shipping directions, obtained possession of the goods as the result of a conspiracy between it and the Union Pacific Company to divert all traffic from such competing line.

Upon a trial to the court below without the intervention of a jury the issues were found for the plaintiff and a judgment rendered in his favor. To reverse this judgment the defendant brings the case here by appeal.

Mr. Justice Hayt delivered the opinion of the court.

From the evidence introduced at the trial it is shown that in the year 1883 a car-load of grain was shipped from St. Edwards, Neb., to the appellee, at Colorado Springs. The city of Denver being the nearest point to Colorado Springs upon the line of the Union Pacific road, the consignor directed the goods to be forwarded from Denver to their destination by the Denver and New Orleans road, which directions were plainly marked upon the receipt given for the goods by the agent of the Union Pacific Company at St. Edwards, and also upon the way-bill filled out at the same time. The agent of the Denver and New Orleans road at Denver, having been informed of the shipment, notified the agent of the Union Pacific road at Denver, shortly before the arrival of these goods, that the former company would insist upon having these goods turned over to it at Denver for transportation over its road to appellee at Colorado Springs, and was informed by the former agent that, in obedience to instructions from his superiors, he must decline to deliver the goods to the Denver and New Orleans road. The agent of the latter road renewed the claim for the goods from day to day, and upon the day of the arrival of the goods in Denver, and while the same were in the yards of the Union Pacific road at Denver, made inquiry in reference to the matter and was informed by the Union Pacific officials that the goods had not yet arrived and could not arrive before the following day. The day after, however, he learned that the goods had arrived the day before and were then at Colorado Springs, having been shipped over the Denver and Rio Grande Railroad, a competing line to the one operated by the Denver and New Orleans Company. It was also shown that it was the common practice at this time for the Union Pacific Company to deliver, and the Denver and Rio Grande road to receive and transport, freight consigned over the Denver and New Orleans road, and that this was done in pursuance of an

agreement between the former companies. Mr. Thomas Whitall, the local freight agent of the Union Pacific Railway Company, testified at the trial that Mr. Taylor, agent of the Denver and New Orleans road, at various times presented to him bills of lading for freight in possession of the Union Pacific Company, but routed over the Denver and New Orleans, and that he believes in every instance such freight was sent by the Denver and Rio Grande road, and that in such cases it was customary to furnish the latter company with bills of lading showing the correct routing directions of the goods. The testimony also shows that this was not only done with the knowledge and consent of the general manager and the general freight agent of the Denver and Rio Grande Company, but that these officers were active and vigilant in requiring goods so routed to be diverted to the Denver and Rio Grande road; and that in the few instances in which, in obedience to the directions of the consignors, the goods were delivered to the Denver and New Orleans road, called for a vigorous protest from them, coupled with an implied threat of retaliation against the Union Pacific Company.

No attempt was made by appellant to disprove the evidence introduced by the appellee in the court below. It is, however, contended upon this appeal that the judgment is contrary to law.

It has been held that a carrier receiving goods to be transported beyond its line, in delivering them to a subsequent carrier acted as a special agent of the consignor, with limited powers; and if it disregarded its instructions and exceeded its authority, the subsequent carrier could not maintain a lien upon the goods for its transportation charges. Fitch *v.* Newberry, 1 Doug. (Mich.) 1. In later decisions in other States the doctrine of the Michigan court, however, has not been followed; the courts now generally holding that a carrier receiving goods to be transported over its own line to a point beyond has the apparent authority to select any of the ordinary routes leading thereto, and that the second carrier receiving the goods in good faith, in the ordinary and usual course of business between connecting lines, without notice of any special directions on the part of the consignor, will have a lien for his reasonable charges for transporting such goods over its own line, and also for such reasonable charges as it may have advanced to the first carrier. Price *v.* Railroad Co., 12 Colo. 402.

An examination of the opinion of Commissioner Stallcup in the case just cited will show that, while the right of the consignors to select the routes over which the goods should be transported is fully recognized, it is held that in case his instructions in reference thereto are not obeyed by the first carrier, the owner's action was not against the innocent second carrier, but against his own wrong-doing agent. In support of this position the following cases were relied upon: Patten *v.* Railroad Co., 29 Fed. Rep. 590; Schneider *v.* Evans, 9 Amer. Law Reg. (N. S.) 536; Briggs *v.* Railway Co., 6 Allen, 246.

In the first two cases cited the ignorance of the second carrier of

the terms of the contract is made an express condition of its exemption from liability in case of loss to the owner. And a reading of the opinion in the case of Briggs *v.* Railway Company, *supra*, will also show that in that case no wrong or negligence was attributable to the defendant company. In the case at bar, however, we have seen that the Union Pacific and the Denver and Rio Grande Companies had entered into an agreement to disregard all directions requiring goods to go over other lines, and that, in pursuance thereof, all routing directions to the contrary were being ignored by both companies; that the general officers of the appellant company were zealously enforcing a compliance on the part of the Union Pacific Company with such agreement; that it was customary for the latter company to deliver goods routed over the Denver and New Orleans road to the Denver and Rio Grande road for transportation; and that goods were so received and forwarded by the latter company, with full knowledge that the same was in violation of the owner's directions, and that the officers of the road entered a vigorous protest whenever the Union Pacific Company delivered goods to the Denver and New Orleans road for transportation, although such delivery was in accordance with the express directions of the owner of the property. The evidence shows that the shipping directions in reference to the goods in controversy were wilfully violated by the Union Pacific Company, and we think, under the evidence, the court below was justified in holding the Denver and Rio Grande Company also responsible for such violation.

This company having been a party to an illegal contract providing not only for a violation of the owner's routing directions, but calculated also to prevent notice of such directions from reaching the second carrier, cannot be shielded in this instance because no witness was able to swear in direct terms that it had notice of the owner's directions in reference to the shipment of these particular goods. Under these circumstances we are of the opinion that the court below was warranted in finding that the possession of the property was not obtained in good faith by the defendant in the ordinary or usual course of business between connecting carriers, but that such possession was wrongful and illegal, and that the defendant was consequently not entitled to a carrier's lien upon the same, either for its own charges or those advanced to the former carrier, and therefore there was no error in entering judgment for plaintiff. Redf. Carr. § 271 *et seq.*; Fitch *v.* Newberry, *supra*; Robinson *v.* Baker, 5 Cush. 137; Andrew *v.* Dieterich, 14 Wend. 31; Briggs *v.* Railroad Co., *supra*. The judgment is accordingly affirmed. *Affirmed.*[1]

Chief Justice HELM not sitting.

[1] *Compare:* Bird *v.* R. R., 72 Ga. 655; Robinson *v.* Baker, 5 Cush. 137; Crossan *v.* R. R., 149 Mass. 196; Fitch *v.* Newberry, 1 Doug. 1; Bowman *v.* Hilton, 11 Ohio, 303; Knight *v.* R. R., 13 R. I. 572. — ED.

ROBINS AND CO. *v.* GRAY.

Queen's Bench, 1895.

[1895, 2 *Q. B.* 78.]

Action tried before Wills, J., without a jury.

The plaintiffs were a firm of dealers in sewing-machines and other articles, and in 1894 they had in their employment one Edward Green as a commercial traveller, who canvassed for orders and sold their goods upon commission. In April, 1894, Green went to stay for the purposes of his business as such traveller at the defendant's hotel, and remained there until the end of July. While he was there the plaintiffs sent to him from time to time certain sewing-machines, watches, chains, and musical albums, which it was in the ordinary course of his business to have at the inn for the purpose of selling them to customers in the district. At the end of July Green was in the defendant's debt for board and lodging to the amount of £4 0*s.* 8*d.*, which sum he neglected to pay. The defendant claimed a lien in respect of this debt upon certain of the goods which had been so sent by the plaintiffs by Green, and detained them accordingly. Before the goods in question had been received into the hotel, or the said debt had been incurred, the defendant had been expressly informed by the plaintiffs that the goods were the plaintiffs' property, and not the property of Green. The plaintiffs brought detinue.

Wills, J. The law applicable to this case is, I think, clear. The defendant no doubt knew, at the time that Green's debt to him was incurred, that the goods upon which he now claims to have a lien were the goods, not of Green, but of his principals. But that fact is, in my opinion, immaterial. The goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by Green to the inn — they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them, as a part of his duty towards his guest. It follows that the lien attached to them. Knowledge on the part of the innkeeper that the goods brought by, or sent to, the guests are not the guest's property, is in my judgment material only where the goods are of a description which the innkeeper is not bound to receive, such as the piano in the case relied on by the plaintiff.

Judgment for the defendant.[1]

[1] *Compare:* Robinson *v.* Walter, 3 Bulst. 209; Broadwood *v.* Granara, 10 Exch. 417; Threfall *v.* Borwick, L. R. 7 Q. B. 711; Singer Co. *v.* Miller, 52 Minn. 516; Covington *v.* Newberger, 99 N. C. 523; Cook *v.* Prentice, 13 Ore. 422; Grump *v.* Showalter, 48 Pa. St. 507; Clayton *v.* Butterfield, 10 Rich. L. 300; Manning *v.* Hollenbeck, 27 Wis. 202. — Ed.

BARRETT *v.* MARKET STREET RAILWAY.

SUPREME COURT OF CALIFORNIA, 1889.

[81 *Cal.* 296.[1]]

ACTION for damages for forcible ejection. Plaintiff tendered conductor of the defendant a five dollar gold piece for a five cent fare. The conductor refused it and thereupon ejected the plaintiff from the car.

PATERSON, J. . . . The question on the merits to which counsel have mainly directed their arguments is, whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time. Civ. Code, sec. 2187. And so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Civ. Code, sec. 2169. This duty, like every other which the law imposes, must have a reasonable performance. And we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that, on entering a street-car, a person should tender the sum of ten cents. Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was six and a quarter cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of 1878 forbids him to "charge or collect a higher rate than five cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at four and a quarter cents. And in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

[1] The case is abridged. — ED.

But it does not follow that the passenger may tender any sum, however large. If he should tender a hundred-dollar bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. *Judgment for plaintiff.*[1]

WILLIAMS *v.* MUTUAL GAS CO.

SUPREME COURT OF MICHIGAN, 1884.

[52 *Mich.* 499.]

ERROR to the Superior Court of Detroit. (CHIPMAN, J.) Jan. 22 — Jan. 29.

Case. Plaintiff brings error. Affirmed.

SHERWOOD, J. The plaintiff, in the month of November, 1879, resided in Detroit and was in possession of and keeping the hotel known as the Biddle House, containing a very large number of rooms, all of which were furnished with gas-pipes and fixtures for the purpose of lighting the same, and which had been so lighted for many years.

The defendant corporation was duly organized under the Act of the Legislature for the formation of gaslight companies, approved February 12, 1855, and located in Detroit. On the 15th day of November aforesaid the defendant, in pursuance of said Act of the Legislature and the charter and by-laws of Detroit, was and had been for some time previous carrying on the business for which it was organized, supplying the citizens at hotels and private dwellings with gas in such quantities as desired, and among others had connected its pipes with those of the Biddle House, and for some time previous had been supplying it with gas as its proprietors desired. On that day the defendant refused to supply the Biddle House longer unless its proprietor, the plaintiff, would keep on deposit with the company $100. It was receiving at that time about $60 worth of gas per week, and its requirements were increasing.

The plaintiff regarding the demand as unreasonable, declined to make the required deposit, and tendered the defendant $75 and demanded that the company should furnish him gas at the Biddle House to that amount. This the defendant refused to do and cut off the service at the hotel.

The plaintiff claims that it was the defendant's duty to furnish him with the gas required, and upon the terms demanded; that he has suf-

[1] *Compare:* Fulton *v.* Grand Trunk Co., 17 U. C., Q. B. 428. — ED.

fered great injury to his business in consequence of the defendant's neglect so to do. And he brings his suit in this case to recover his damages. A trial was had in the Superior Court of Detroit, and the judge directed a verdict for the defendant. The plaintiff brings error and the case is now before us on a bill of exceptions containing all the testimony.

The questions presented and argued before the judge of the Superior Court by counsel for defendant were — First, the plaintiff could not recover for the reason the defendant was under no legal duty or obligation to supply any citizen of Detroit with gas; and, second, if such duty was imposed upon the defendant, the conditions upon which the defendant proposed and offered to perform it were reasonable. The court disagreed with the defendant's counsel in the first position, but sustained them in the second. I agree with the judge of the Superior Court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the centre of Woodward Avenue, with gas wherever the defendant has connected its mains and service pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same.

The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the State and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot therefore be well likened to that of the innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone, or mill-owner. The company, however, in the discharge of its duty may govern its action by reasonable rules and regulations, and when it has done so all persons dealing with it, as well as the company itself, must yield obedience thereto. The statute under which the defendant company is organized provides it may ordain and enact by-laws for that purpose; but the record discloses no such action taken on the part of the defendant; neither does it show any general action or custom of the company in making terms with, or for supplying gas to, proprietors of hotels or other persons except as required in this case.

The president of the defendant company was sworn and examined, and testified that the defendant made weekly or monthly collections for gas furnished. He further said that the defendant refused to let the plaintiff have a supply for the Biddle House unless he would first sign a contract with the company therefor, and in addition thereto keep on deposit with the company the sum of one hundred dollars so long as it furnished him with a supply; that the plaintiff tendered the defendant $75, and demanded that the company should supply the

house and offered to give good personal security for payment and performance on his part to the extent it should be furnished or the company require; and that the company refuse to accept the terms proposed by plaintiff, or furnish his house with gas as required.

This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens.

It is true that neither by the charter of the company, its articles of association, or the by-laws of the city authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is, however, within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts, that the manufacture and supply of inflamable gas for the purpose of lighting cities, villages, stores, hotels, and dwellings, is not a domestic or family manufacture. It is carried on almost exclusively by public or associated capital, and to make it a paying industry requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or State authority. Associations of this kind, as has been well said, "are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world." It is not a trading corporation, its product is designed for the citizen, and the extent to which it is used depends upon home consumption in the immediate neighborhood and community in which the manufacture is wrought. It is in the strictest sense a local commodity, and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location, and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the company a public character, and, to a certain extent, a monopoly which can never be tolerated, only upon the ground of some corresponding duty to meet the public want. Such duty rests upon this defendant, and I think it requires the company to furnish to this plaintiff, at the Biddle House, the supply of gas demanded, under reasonable rules and regulations, but among all such as might be mentioned, it is with the defendant to adopt and rely upon such as it may select. This is its privilege.

The duty of the company towards the citizen, and that of the citizen towards the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the courts.

When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it im-

posed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business.

If the defendant, as one of such conditions, required the plaintiff to give sufficient security that he would make such payment and perform such conditions, before making such service, I thing it would have been reasonable, but in the place of such security the defendant demanded a deposit of money with the company, as had been its custom. This the company had a right to do. The condition was a reasonable one. The requirement of a special contract between the parties, in addition to the deposit of money, may not be unreasonable, still it was quite unnecessary. The law implies all the contract needed, and courts will enforce it in all cases to the extent necessary to secure the rights of the parties.

I think the judgment of the Superior Court should be affirmed.

The other justices concurred.

WHEELER *v.* NORTHERN COLORADO IRRIGATION CO.

SUPREME COURT OF COLORADO, 1887.

[10 *Col.* 582.[1]]

HELM, J. . . . The pleadings in the case at bar show that respondent is a carrier and distributer of water for irrigation and other purposes. That its canal, two years ago, was upwards of sixty miles in length and capable of supplying water to irrigate a large area of land. That relator is one of the land-owners and consumers under the canal, and can obtain water from no other source; also, that respondent has, undisposed, a sufficient quantity to supply his wants. That he tendered the sum of $1.50 per acre, the annual rental fixed by respondent, and demanded the use of water for the current season, but declined to pay the further sum of $10 per acre also demanded, and to sign a certain contract presented to him for execution. That respondent refused, and still refuses, to grant relator's request, except upon compliance with these conditions. The remaining essential facts will sufficiently appear in connection with the specific questions of law presented, as they are in their proper order discussed.

Were the constitution and statutes absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise; it has, in most instances, from the nature

[1] This case is abridged. — ED.

of things, a monopoly of the business along the line of its canal; its vocation, together with the use of its property, are closely allied to the public interest; its conduct in connection therewith materially affects the community at large; it is, I think, charged with what the decisions term a public duty or trust. In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges. And an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference. Munn *v.* People, 4 Otto, 113, and cases cited; Price *v.* Riverside L. L. C., 56 Cal. 431; C. & N. W. R. R. Co. *v.* People, 56 Ill. 365; Vincent *v.* Chicago & Alton R. R. Co., 49 Ill. 33.

But the constitution is not silent in the particular mentioned. It evinces, beyond question, a purpose to subject this, as other branches of the business, to a certain degree of public control. As we have seen, it provides for a tribunal to which the maximum amount of water rates may be referred, in case of dispute between the carrier and consumer. And I think that, by fair implication, it forbids the carrier's enforcement of unreasonable and oppressive demands in relation to the time and manner of collecting these rates. Any other view would accuse the convention of but partially doing its work. For the fixing of maximum rates would be protection, grossly inadequate, if either of the parties might dictate, absolutely, the time and conditions of payment. The primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier's right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitution also unequivocally asserts the consumer's right to its use, upon payment of such compensation.

Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject.

The contract which respondent required relator to sign and agree to comply with, as a condition precedent to the granting of his request, contains the following among other conditions: That he buy in advance "the right to receive and use water" from its canal, paying therefor the sum of $10 per acre; also that he further pay "annually in advance, on or before the 1st day in May of each year, such reasonable rental per annum, not less than $1.50 nor more than $4 per acre, as may be established from year to year" by respondent. If we hold respondent to the literal term used in this contract we must declare the $10 exaction illegal. Respondent cannot collect of relator the sum of $10, or any other sum, for the privilege of exercising his constitutional right to use water.

But counsel contended in argument that the foregoing expressions,

quoted from respondent's contract, are not intended to require the payment of $10 per acre for a right to use water. They say this $10 is merely a portion of the annual "rental" exacted of consumers in advance for the remaining years of respondent's corporate existence; that instead of requiring, say, $2.50 per acre for each irrigating season in turn, respondent has seen fit to divide this sum into two parts, collecting $1.50 annually, and the residue of $1 each for the remaining ten years of its corporate life, as one entire sum in advance.

This construction of the contract may, under all the circumstances, seem plausible, though I doubt if the courts could accept it; but if accepted the difficulty under which respondent labors would not be obviated.

If the carrier may collect a part of its annual transportation charge in advance for the remaining years of its corporate life, it may collect all. Suppose the company just organized; under counsel's view the consumer may, there being no legislation on the subject, be compelled to pay the cost of delivering water to him for the entire twenty years of its existence, before he can exercise his constitutional right during a single season.

But there is nothing in the law obliging him to cultivate his land for any particular period. He may not want the water for twenty years, or it may be utterly impossible for him to advance so large a sum at once. In fact, the majority of those who till the soil are too poor to comply with such a demand; to say that they must do so or have no water is to deprive them of their right to its use just as effectually as though the right itself had no existence. It is true these people would not themselves be able to bring water from the natural streams to their farms, and without the carrier they might be compelled to abandon their attempt at agriculture. This consideration, however, only reinforces the position that a reasonable control was intended. The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation.

Besides the extraordinary power mentioned, the carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B. could have water because he can pay for its carriage twenty years in advance; C. could not have water because he is unable to pay in advance for its carriage beyond a season or two.

But, say counsel, C.'s only remedy, and the only remedy of relator and other consumers dissatisfied with the carrier's terms, is by applica-

tion to the county commissioners. I reply: First, that so far as the present case is concerned, this suggestion embodies but little consolation. Relator's land is situate in Arapahoe county. The statute, as it stood when the proceedings described in the alternative writ took place, did not permit the commissioners of that county to act with reference to respondent's canal; while, under the constitution, the commissioners of no other county could exercise the necessary jurisdiction. It was utterly impossible, therefore, for relator to secure relief in the manner pointed out, and if the courts could not take cognizance of the alleged grievance he was wholly bereft of means of redress. I reply: Second, that the commissioners may be empowered to fix the maximum amount of the rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go. In my judgment, under the constitution they cannot be vested with authority to establish the exact rate to be charged, or to specify either the time or conditions of payment. The time and conditions of payment are proper subjects for legislation. The Legislature doubtless has authority to say that the rate, whether the carrier adopt the maximum fixed by the commissioners or establish one below such limit, shall be collected annually in advance of each irrigating season; or it can make any other reasonable regulations in these respects. But the legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the rights secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law.

A further consideration worthy of mention in passing, bearing at least upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for twenty years in advance. What assurance has he that the carrier can or will keep its engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent, for the recovery of his large advancement, upon the doubtful experiment of suit against an insolvent company.

To say that the courts may not interfere, under the circumstances above narrated, is to say that the clear intent of the constitution in relation to a constitutional right may be disregarded with impunity, simply because no express inhibitory constitutional or statutory provision on the subject can be found; also that, for a like reason, one charged with an important duty may condition its performance upon unreasonable and oppressive demands.

I do not usurp the province of the Legislature by declaring what would be reasonable requirements as to the time and manner of collecting water rates. My position is that, for the reasons given, respondent's demand of $10 per acre, as an advance payment of part of the transportation charge for the remaining years of its corporate life, is illegal as well as unreasonable and oppressive.

Respondent's enterprise is of great public importance and benefit. The original construction of its canal cost large sums of money, and its running expenses are necessarily heavy. For a considerable period the capital invested must have been unproductive. These and other circumstances may be proper subjects for consideration by the commissioners, when called upon to establish a maximum rate. And whenever they become appropriate matters for judicial cognizance, the attention deserved will be received from the courts. But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, the consumer objecting, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season.

It is not necessary to consider what would have been the result had respondent charged $11.50 per acre for the irrigating season of 1886, instead of demanding $1.50 for that season and $10 per acre as part payment for future years. Neither is it necessary to speculate as to what respondent would have charged for the season mentioned had the law been understood by its officers according to the construction above given. In view of the pleadings, and especially of the language employed in respondent's contract, I think that relator, upon the showing made, was entitled to the use of water from respondent's canal for the irrigating season specified in the alternative writ. This conclusion is emphasized by the defective condition of the commissioners' statute prior to 1887, which left relator helpless so far as action by that body was concerned. I also think that *mandamus* lay for the enforcement of his rights in the premises.

The demurrer should have been overruled and the judgment must, therefore, be reversed, appellant recovering his costs.

But courts do not order the performance of impossible acts. This proceeding was instituted for the purpose of compelling respondent to supply relator with water during the irrigating season of 1886. Since then respondent may have changed its annual charge or rate; besides, the only tender or demand appearing in the record were for that season. To order compliance with relator's request for 1886 would be absurd; to order a delivery of the water for 1888 would be unwarranted. To permit an amendment of the alternative writ, so as to cover the approaching irrigating season, would be to allow the substitution, in this proceeding, of a new and wholly different cause of action and to violate an established rule of pleading.

The judgment is reversed and the cause remanded.

LOUISVILLE GAS CO. *v.* DULANEY AND ALEXANDER.

COURT OF APPEALS, KENTUCKY, 1897.

[100 *Ky.* 405.[1]]

HAZELRIGG, J., delivered the opinion of the court.

The charter of the appellant confers on it the exclusive privilege of erecting, maintaining, and operating gas works in the city of Louisville for the manufacture and sale of gas for illuminating purposes, and section 12 thereof provides that "said company shall furnish illuminating gas to private consumers who may apply therefor, under reasonable rules and regulations to be prescribed by the company, at a price not to exceed one dollar and thirty-five cents for one thousand cubic feet, less a discount of five cents per one thousand cubic feet, to all persons, including the city, except as to street lamps, paying their bills within five days after same are due."

The appellees are private consumers of the appellant's gas, and upon their refusal to pay a charge for meter rent the company was about to shut off the supply. This the appellees enjoined, relying on the provisions of the section quoted as furnishing the total charge for gas to which they could be subjected.

The meter rent is sought to be upheld as a "reasonable rule and regulation," within the meaning of those terms in the charter, and is not imposed on consumers, as appears from the answer, unless they fail to use a certain minimum amount of gas in a given month.

This process of charging rent is illustrated by the memorandum on the back of the gas bills on file, as follows: —

"METER RENT.

"3 light meter, consuming 500 cubic feet or less, 10 cents per month.

"5 light meter, consuming 800 cubic feet or less, 12 cents per month.

"10 light meter, consuming 1,000 cubic feet or less, 15 cents per month.

"20 light meter, consuming 1,200 cubic feet or less, 17 cents per month.

"30 light meter, consuming 1,500 cubic feet or less, 20 cents per month.

"45 light meter," etc.

Appellees, Dulaney and Alexander, used (in their law office) a three-light meter, and, having consumed in a given month only 200 cubic feet, were charged ten cents in addition to the regular price of the gas. Appellee Stone used a thirty-light meter (in his residence), and, having

[1] Opinion only is printed. — ED.

consumed less than 1,500 cubic feet in three given months, was charged sixty cents in addition to the price of gas.

It is averred in the answers that there are many persons in the city to whose fixtures in their houses, stores, and offices the appellant has attached its pipes, but who procure their lights from certain electric light companies, and who use the gas light furnished by the appellant only occasionally, and when by accident they are deprived of their electric lights; that these persons, therefore, use a very small quantity of gas, and are the persons mainly affected by the meter charge; that in adopting this rule to furnish gas to all who apply, however small a quantity may be demanded, and fixing a uniform charge on rent of meters when a minimum amount of gas is consumed, it has attempted in good faith to do justice to all without discrimination. A demurrer was sustained to the answer in each case, and the injunction perpetuated. In this we concur.

The gas meter is the property of the company, and is as necessary to the company in the measurement of its gas as are its works for its manufacture. At least some process of measurement is as necessary, and while other methods have been used, the meter, we believe, is regarded as the best known method, and is generally adopted. While the consumer may cause it to be inspected, and may test the accuracy of its work, his concern is only to ascertain and pay for what gas he has consumed, and cannot be called on to pay for the apparatus used in its measurement any more than he can be made to pay for the machinery used in its manufacture. He is required to pay the legal rate for the quantity consumed, and this quantity must be ascertained by the company by some correct method.

The company can only charge for the quantity it actually furnishes, and, to ascertain what it furnishes, it must measure it — how, the consumer does not care, so it is measured correctly.

The appellees, therefore, are entitled to have their gas furnished to them already measured; and, for it so measured, they can be made to pay at the price of $1.35 per thousand feet, and no more.

If the price of gas were unrestricted in the organic law of the corporation, the rule charging a higher price to small consumers might be upheld. A wholesale merchant sells for a less price than does the retailer, and this is entirely reasonable. The question would then be the ascertainment of what is a reasonable rate, and this is the question involved in the case, relied on by the appellant, of the State of Missouri *ex rel.*, &c., *v.* Sedalia Gas Light Co., 34 Mo. App. 501. There the company required the payment by the consumer of $1.25 per month when the amount of gas used was less than 500 cubic feet, and this sum was denominated "rent of meter." It was held that this charge was not unreasonable, and that while the sum fixed was designated as "rent of meter," it was in fact pay for all gas consumed by the customer to the extent of 500 cubic feet.

Presumably the company was aware when it obtained its charter and

established its monopoly that there would be small consumers as well as large ones, and there would be less profit in furnishing the one class than the other, but it did not on that account reject the charter or obtain the right to add to the price of the small consumer's bill.

The judgments are affirmed.

GOULD *v.* EDISON ELECTRIC ILLUMINATING CO.

SUPREME COURT OF NEW YORK, 1899.

[60 *N. Y. S.* 559.]

BEEKMAN, J. This action is brought for a mandatory injunction requiring the defendant to reconnect the electric light appliances in plaintiff's apartments with the conductors of the defendant, and to resume supplying the plaintiff with electric light. Damages to the extent of $500 are also demanded for the refusal of the defendant to comply with plaintiff's demand for such service. An answer has been interposed, which, among others, contains what is described as a second and separate defence to the amended complaint. To this the plaintiff has demurred for insufficiency. Without undertaking to state in full the allegations it contains, which are somewhat voluminous, it is sufficient to say that the controversy arises upon the reasonableness of one provision which the defendant requires the plaintiff to assent to as a condition of supplying him with the light desired. This provision was embodied in a paper tendered to the plaintiff for signature, described in the answer as "the usual and regular application for lighting service of the form and tenor theretofore adopted by the defendant, and required of all its customers." The stipulation in question, quoting from the answer, was that the plaintiff "would use electric current supplied by defendant for lighting his premises for the period of one year from the time at which connection between the defendant's mains and his premises should be made, and that he would pay for such electric current used by him during each month on presentation of bill at the rate of one cent per hour for each sixteen candle-power lamp, or the equivalent thereof, as measured by the meter upon the said premises for the purpose of measuring the current supplied under such application, subject to certain discounts therein set forth." It was further provided that "a minimum monthly charge of one dollar and fifty cents ($1.50) should be made by the company for each separate month during which the agreement should be in effect." It is this last provision which the plaintiff resists as unreasonable, and, if his contention in that regard is correct, the defendant had no right to require his assent thereto as a condition of performing the legal duty which rests upon it of supplying light when properly demanded. What that duty is is expressed in article 6, § 65, of the transportation cor-

porations law (chapter 566, Laws 1890), which, among other things, provides that, upon application in writing of the owner or occupant of any building or premises within one hundred feet of the wires of any electric-light corporation, and the payment by him of all money due from him to such corporation, the latter shall supply electric light as may be required for lighting such building or premises; and that if for the space of ten days after such application and the deposit, if any be required, of a reasonable sum, which the company is entitled to exact as security for the payment of its compensation, the corporation shall refuse or neglect to supply electric light as required, such corporation shall forfeit and pay to the applicant the sum of $10, and the further sum of $5 for every day thereafter during which such refusal or neglect shall continue. It is provided, however, that no such corporation shall be required to lay wires necessary to comply with such an application where the ground in which the same is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the wire required to be laid, and the expense of laying such portion.

It will be observed that the Legislature has not undertaken to regulate the price at which such light shall be supplied, nor to limit or define what compensation the corporation may exact for the service rendered by it. In that regard it is under no legal restraint, except that its charges must be reasonable and uniform. Whether, in a given case, they are so or not, is a proper subject for inquiry and determination by the court, in view of the *quasi* public nature of the business, and the duty towards the public imposed by law upon the corporation. Lough *v.* Outerbridge, 143 N. Y. 271, 277, 38 N. E. 292. The statute recognizes the right to charge for light consumed, the cost and expense of laying wires, and a rental for wire and apparatus (Transportation Corporations Law, art. 6, §§ 66, 68); but it does not assume to say what may or may not be reserved for either, nor does it require the amount charged to be separated into items with respect to its constituent elements. The law does not contemplate that the defendant shall do business at a loss. It is expected that it will, and it is entitled to, make a reasonable profit upon its venture, and the sole question in such a case as this is whether the charge made is unreasonable, considering all that the defendant is required to do to meet each customer's demand. It is stated in the fourth paragraph of the defence demurred to that the current is generated by dynamos driven by steam engines supplied with steam from boilers, all located in a station building, and, when generated, is transmitted directly to the defendant's underground conductors leading to the premises of the consumer; that each additional lamp connected with defendant's system necessitates an additional investment by it in distributing conductors and local appliances of about $20 in addition to the cost of generating and deliv-

ering the electric current; that the number of lamps which the plaintiff desired was eleven, and that the total additional investment thus made necessary in order to comply with his demand for service was at least the sum of $220. How, then, can it be said that a fixed charge, not based upon actual consumption, is of itself improper or unreasonable? The customer does not bind himself to use any particular amount of light, so that the return to the company, based on actual consumption, would rest entirely upon his volition, and it would, therefore, depend upon him whether the service he has required the corporation to be in constant and immediate readiness to render is profitable or unprofitable to the latter. But this constant condition of readiness is a necessary and unavoidable obligation, which must be sustained, in order to meet instantaneously the demand for light, which the consumer is entitled to have at any moment that he wishes it. It thus forms a part of the service to be rendered, and is an item properly to be considered when the reasonableness of the charges exacted by the company is called in question. As we have seen, the latter is not confined by statute to any specific rate, nor has any attempt been made to measure or limit the compensation which such corporations may lawfully charge, as has been done in the case of gas companies, so that they are free to exact a reasonable return for the service required, which includes, as I have said, not only the actual supply of electric light, but the readiness to supply it, coincidently with the customer's desire to have it. The only condition affecting the right is that the compensation must be reasonable, and, what is also incidental to this requirement, that it should be uniform, namely, the same for all customers similarly situated. Undoubtedly, the demand which those desiring to use it are entitled to make for electric light imports an intention on their part to consume it to some extent, and that each lamp ordered is requisite for that purpose. The charge which the defendant makes is based primarily upon actual consumption over which it has no control. One consumer with the same number of lamps will use more than another. In both cases the return to the company may be remunerative, or the use of one may be so inconsiderable as to involve a loss. To meet this contingency the monthly minimum charge of $1.50 is made. But it must be borne in mind that this payment is not in addition to the charge for actual consumption. Where light is consumed which entitles the company to payment, on meter measurement, of a sum per month equal to or in excess of the so-called minimum charge, the customer pays only for the light he has actually had; so that this fixed charge becomes practically operative only where his consumption falls below the extent of use which it measures. I can see nothing unreasonable in this when the service, as I have defined it, which the company is obliged to render, is considered. It is not a penalty for a failure to use defendant's product, but is properly to be regarded as compensatory for that part of the service which is at all times being rendered in the maintenance of the apparatus and connections through which the electric current is

made available to the customer for the production of light at his pleasure. The plaintiff distinctly refused to pay any such charge, and the defendant was, therefore, justified in refusing to supply him with light. The duty resting upon the company under the statute imports a reciprocal one on the part of the customer to pay for the service which he requires, and, where the latter refuses in advance to pay charges which appear to be reasonable, the company is under no obligation to render the service demanded. As the defence in question is sufficient upon its face, it follows that the demurrer thereto must be overruled.

The demurrer is therefore overruled, with costs, and judgment ordered in favor of the defendant accordingly.

CLINTON ELECTRIC L. H. AND P. CO. *v.* SNELL.

Appellate Court, Illinois, 1900.

[95 *Ill. App.* 552.]

Mandamus. Appeal from the Circuit Court of De Witt County; the Hon. William G. Cochran, Judge, presiding. Heard in this court at the November term, 1900. Reversed and remanded with directions. Opinion filed June 10, 1901.

Mr. Presiding Justice Harker delivered the opinion of the court.

Appellant owns and operates an electric light plant in the city of Clinton, Illinois. Appellee is the owner of a large dwelling house, occupied by himself and family, situated on one of the principal streets of Clinton. Appellee having wired his house for electric lighting, called upon appellant to connect his house with its plant and furnish him light upon the same terms required from other citizens in the vicinity. Appellant refused unless appellee would furnish or pay for a transformer. A transformer is a coil of copper wire imbedded in a sheet iron box and usually placed on a pole outside the building to be lighted. Its object is to reduce the voltage of electricity as it passes from the main wire to the wire connecting the building. Without it there would be greater danger of fire. The evidence shows that the cost of a transformer of the size necessary for appellee's house is twenty-five dollars. Appellee declined to furnish or pay for one and instituted this proceeding by *mandamus* in the Circuit Court to compel appellant to connect his house with its plant and furnish him with light. The cause was submitted to a jury to find the material facts, who, to that end, answered twenty-three special interrogatories propounded. The court then held upon propositions of law and rendered judgment awarding a peremptory writ of *mandamus* compelling appellant to furnish electricity for appellee's house without payment for a transformer.

In their printed brief and argument, counsel for appellant urge that

some of the special findings of the jury are contradictory, that some are not material and that others are against the evidence. They also urge that the court erred in refusing, as law, certain propositions tendered. In the view we take of the facts and the law of the case, it is unnecessary to discuss in detail the special findings of the jury or the holdings of the court on propositions of law.

There is no statute of this State regulating the manner under which electric light companies shall do business. Such a company can fix its rates and establish its rules, subject only to the common law and such regulations as may be imposed by the municipality which grants its franchise. The common-law rule against discrimination does not require a gas light company or an electric light company to treat all patrons alike. It may bestow favors upon one that it withholds from others, providing it deals justly and reasonably by the others. The discrimination which the law forbids and on account of which the court will be justified in interference by *mandamus* must be unjust or unreasonable. The object of the rule is to protect patrons from extortion by persons and corporations enjoying exclusive franchises and privileges.

The evidence shows that before the commencement of this suit, appellant had been in the business of wiring houses and furnishing electricity for lighting in Clinton for ten or twelve years. During that time it had wired 280 houses, for which it received a profit. To such of its patrons, it furnished transformers free. Some fifteen or twenty other houses were wired by other parties. For some of the number transformers were furnished by appellant free, while others were charged for them.

It is clear from the proofs that appellant exacted the payment for a transformer from appellee because he had elected to wire his own house. It had the legal right to do so unless a transformer was unnecessary for appellee's house or its demands upon appellee amounted to extortion. The house is a very large one and there are so many lights to be supplied that the employment of an individual transformer is necessary. There was no discrimination, whatever, in furnishing to patrons who employed appellant to wire their houses for a profit, the use of a transformer free, and charging the cost of one to those who wired their own houses. The discrimination, if any, consisted in furnishing the appliance free to some and charging other of the last named patrons with the cost of it. As we look upon it, those who receive the use of the transformers free were simply fortunate in having a favor granted to them, and there was no extortion in requiring others to pay.

It is fundamental that a peremptory writ of *mandamus* will be granted only where the petitioner shows a clear and undoubted right to it. We are of the opinion that the discrimination complained of was neither unjust nor unreasonable. The judgment will therefore be reversed and the cause remanded, with directions to the Circuit Court to deny the writ and dismiss the petition.

Reversed and remanded.

SMITH *v.* CAPITAL GAS CO.

SUPREME COURT OF CALIFORNIA, 1901.

[132 *Cal.* 209.[1]]

SMITH, C. The suit was brought to recover of the defendant liquidated damages, — amounting to thirteen hundred dollars, — alleged to be due under the provisions of § 629 of the Civil Code, for refusal to furnish gas to the plaintiff. The judgment was for the defendant, and the plaintiff appeals. The provision of the code in question is, that, "upon the application, in writing, of the owner or occupant of any building or premises distant not more than one hundred feet from any main of the corporation, . . . the corporation must supply gas as required for such building or premises," &c.; and further, that "if, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for every day such refusal or neglect continues thereafter." The case as presented by the findings is as follows: —

The defendant is a corporation engaged in supplying the city of Sacramento with gas, and the plaintiff is an occupant of premises within a hundred feet of one of its mains. September 22, 1898, the plaintiff served on the defendant a written notice, which (omitting date, address, and signature) was as follows: "You will please immediately supply me with gas for the premises occupied by me," &c. (describing them). The defendant, in reply, within ten days thereafter, "notified plaintiff that it would supply plaintiff with gas for said building and premises, if plaintiff would furnish a meter, or agree to pay defendant fifty cents per month as rent for a meter," and "plaintiff refused to furnish a meter, or to pay said rent to the defendant." The rent demanded was found by the court to be "fair and equitable," representing the monthly cost of the meter to the defendant, for care, labor, interest on investment, &c. But it is found that the defendant had no rule requiring payment of rent for meters, nor did it charge its other customers therefor. The defendant, it seems, had, prior to September 8, 1898, been supplying plaintiff with gas; but the plaintiff, during the year preceding that date, had used electrical lights mainly and almost exclusively, and the total amount of gas used on the premises amounted only to the value of $1.75; and the defendant, on that date, had removed the meter, thereby depriving the plaintiff of gas. It is found — in a passage following the statement of the above facts, and the written notice — that "said gas" was and is necessary for the plaintiff's use on the premises in question. But — unless this expression be

[1] Opinion only is printed. — ED.

construed as referring to the gas used prior to September 8, 1898, — it does not appear how much or what gas was needed.

There can be no doubt, I think, of the right of gas companies, ordinarily, to charge rents for meters. Civ. Code, § 632; Sheward *v.* Citizens' Water Co., 90 Cal. 641. But the point is made by the appellant, that, in charging him with such rent, when other consumers were not required to pay it, "the defendant arbitrarily discriminated against the plaintiff." But I do not think this is the case. Ordinarily, compensation for the meter is received from the return for the gas consumed. But here the value of the gas consumed during the year preceding the removal of the meter was not equal to a sixth part of the annual expense of the meter. The plaintiff's written demand did not specify, even in a general way, the amount of gas required, or even that he required more gas than he had been in the habit of using, Andrews *v.* North River, &c. Co., 51 N. Y. Supp. 872; and the defendant was quite justified in supposing that he required no more. Code Civ. Proc., § 1963; 1 Greenleaf on Evidence, § 41. A "state of mind once proved to exist [is] presumed to remain such until the contrary appears." 1 Greenleaf on Evidence, § 42. The case, therefore, stands as though the plaintiff's demand had been simply for the restoration of the *status quo* — *i. e*, for the use of the quantity of gas he had been using. The plaintiff's case was therefore altogether exceptional, and, we may assume, unique. For there is neither finding nor allegation that there were any others in the same category, and if none, then there was no discrimination; and if there were any such, it devolved on the plaintiff to allege and to prove it; for to render one liable for a penalty, every material fact necessary to bring the case within the statute must be affirmatively shown. Conly *v.* Clay, 90 Hun, 20; Village of Hardwick *v.* Vermont T. and T. Co., 70 Vt. 180; 40 Atl. Rep. 169. The defendant was justified, then, in notifying the plaintiff that he would be charged with rent for the meter, if supplied by the company; and the plaintiff's refusal to agree to this was its sufficient justification in refusing to furnish gas.

I advise that the judgment be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Henshaw, J., Temple, J.

Hearing in banc denied.[1]

[1] *Compare:* Sheward *v.* Water Co., 90 Cal. 640; Gas Co. *v.* Dulaney, 100 Ky. 405; S. *v.* Gas Light Co., 34 Mo. App. 501; S. *v.* Gas Light Co., 34 Ohio St. 572; Andrews *v.* Light Co., 18 N. Y. S. 50. — Ed.

CANADA SOUTHERN RAILWAY CO. *v.* INTERNATIONAL BRIDGE CO.

PRIVY COUNCIL, 1883.

[8 *App. Cas.* 723.[1]]

BY the decree in the first appeal it was declared that the respondent International Bridge Company was entitled to certain tolls claimed by it from the appellants for the use by them of the respondent's bridge, and consequential relief.

The appellant is a corporation under the laws of the Dominion of Canada. Its railway is adjacent to the Canadian terminus of the International Bridge crossing the River Niagara. It also works a line of railway from such terminus to Lake Ontario. The International Bridge has one of its termini in the Province of Ontario and the other in the State of New York. The bridge and approaches are owned and maintained by the International Bridge Company, which is incorporated under the laws of the Dominion of Canada and also under the laws of the State of New York, and an agreement made thereunder: see an Act of the State of New York passed on the 17th of April, 1857, intituled "An Act to incorporate the International Bridge Company," and an Act of the Legislature of the former province of Canada, 20 Vict. c. 227. See further an Act of the State of New York, passed May 4, 1869, and Canadian Act, 32 & 33 Vict. c. 65, in virtue whereof an agreement or act of consolidation, dated the 18th of May, 1870, was entered into from which the International Bridge Company derived its origin.

The questions decided in this appeal are, first, as to the construction of the Acts of the Canadian Legislature, viz., 20 Vict. c. 227, sects. 14, 16, and 22 Vict. c. 124 (which amended the former act), sect. 2, as to the right to demand tolls; second, whether the tolls are reasonable or are shown to be unreasonable.

THE LORD CHANCELLOR (Earl of SELBOURNE). . . . It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made.

[1] This case is abridged. — ED.

One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Appeal of the Province of Ontario should be affirmed, and both these appeals dismissed with costs.

COTTING *v.* GODDARD.

SUPREME COURT OF THE UNITED STATES, 1901.

[22 *S. C. Rep.* 30.[1]]

APPEAL from a decree of the Circuit Court of the United States for the District of Kansas dismissing a complaint in a suit to restrain the enforcement of a statute. *Reversed.*

Statement by Mr. Justice BREWER:

In March, 1897, Charles U. Cotting, a citizen of the State of Massachusetts, filed in the Circuit Court of the United States for the district of Kansas, a bill of complaint against the Kansas City Stock-Yards Company, a corporation of the State of Kansas, and certain officers of that company, and Louis C. Boyle, Attorney-General of the State of Kansas. A few days later Francis Lee Higginson, a citizen of the

[1] This case is abridged — ED.

State of Massachusetts, filed a bill of complaint in the same court and against the same parties.

These suits were subsequently ordered by the court to be consolidated, and were thereafter proceeded in as one.

The plaintiffs respectively alleged that they were stockholders of the Kansas City Stock-Yards Company, and that the suits were brought in their own behalf and that of other stockholders having a like interest, who might thereafter join in the prosecution thereof. The main purpose of the suits was to have declared invalid a certain act of the Legislature of the State of Kansas approved March 3, 1897, entitled "An Act Defining What shall Constitute Public Stock-Yards, Defining the Duties of the Person or Persons Operating the Same, and Regulating All Charges thereof, and Removing Restrictions in the Trade of Dead Animals, and Providing Penalties for Violations of This Act."

A temporary restraining order was granted, and subsequently a motion for a preliminary injunction was made. Pending that motion the court appointed a special master, with power to take testimony and report the same, with his findings, as to all matters and things in issue upon the hearing of the preliminary injunction prayed for. 79 Fed. 679. On August 24, 1897, the special master filed his report. On October 4, 1897, the motion for a preliminary injunction was heard on affidavits, the master's report, exceptions thereto on behalf of both parties, and arguments of counsel. The motion was refused and the restraining order, which had remained in force in the meantime, was set aside. 82 Fed. 839.

A stipulation was thereupon entered into that the defendants should forthwith file their answers to the bills; that replications thereto should be immediately filed; and that the cases thus put in issue should be heard on final hearing, upon the pleadings, proofs, master's report, and exhibits, without further testimony from either party.

On October 28, 1897, after argument, the court dismissed the bills of complaint. 82 Fed. 850.

Mr. Justice Brewer. . . . In this case, as heretofore indicated, a volume of testimony has been taken, mainly upon the question of the cost and value of the stock-yards, and the effect upon the income of the company by reason of the proposed reduction. This testimony was taken before a master, with instructions to report the cost of the stock-yards, the present value of the property, the receipts and expenditures thereof, the manner of operation, and such other matters as might be pertinent for a determination of the case. Stated in general terms, his findings were that the value of the property used for stock-yard purposes, including the value of certain supplies of feed and materials which were on hand December 31, 1896, is $5,388,003.25; that the gross income realized by the stock-yards company during the year 1896, which was taken as representing its average gross income, was $1,012,271.22. The total expenditures of the company for all purposes during the same period amounted to $535,297.14, — thus indicating a

net income for the year of $476,974.08. The court, however, increased the estimate of the net income by adding to the expenditures the sum of $13,584,65, expended in repairs and construction, thus placing the net income at the amount of $590,558.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896 the income of the stock-yards company would have been reduced that year $300,651.77, leaving a net income of $289,916.96. This would have yielded a return of 5.3 per cent on the value of property used for stock-yard purposes, as fixed by the master. Or if the capital stock be taken after deducting therefrom such portion thereof which represents property not used for stock-yard purposes, the return would be 4.6 per cent.

Counsel for appellants challenge the correctness of these findings, and seek to show by a review of the testimony that no such per cent of return on the real value of the investment would be received by the company in case the proposed reduction is put into effect. But, without stopping to enter into the inquiry suggested by their contention, it is enough for our present purpose to state in general the conclusions of the master and the court.

On the other hand, it is shown by the findings, approved by the court, that the prices charged in these stock-yards are no higher, and in some respects lower, than those charged in any other stock-yards in the country, and finding 37 is —

"The other stock-yards heretofore enumerated are operated generally in the same manner as those at Kansas City, and there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live-stock from competitive territories. Kansas City is the greatest stocker and feeder market in the world, and while Chicago exceeds it as a general market, yet, because of the expense of transportation from Kansas City there, and the loss in weight by shrinkage during such transportation, the live-stock shipped to and sold at Kansas City in 1896 realized for its owners more than $1,500,000 in excess of the amount which would have been realized if forwarded from Kansas City to and sold on the Chicago market."

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the

public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain ? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public ?

Again, wherever a purely public use is contemplated, the State may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work ? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is

willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all State regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business.

Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the Legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered?

Again, the findings show that the gross receipts for the year 1896 were $1,012,271.22; that the total number of stock received during the same time was 5,471,246. In other words, the charge *per capita* was eighteen cents and five mills. So that one shipping to the stock-yards one hundred head of stock was charged $18.50 for the privileges of the yard, the attendance of the employees, and the feed furnished. While from these figures alone we might not say that the charges were reasonable or unreasonable, we cannot but be impressed with the fact that the smallness of the charge suggests no extortion. Further, as heretofore noticed, the findings show that the establishment of these yards has operated to secure to the shippers during a single year $1,500,000 more than they would have realized in case of their non-existence and a consequent shipment to Chicago, the other great stock market of the country.

"Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and

furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns."

If the average daily receipts of a stock-yard are more than one hundred head of cattle, or more than three hundred head of hogs, or more than three hundred head of sheep, it comes within the purview of this statute. If less than the amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock-yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling one hundred or more passengers a day to charge only a specified amount per mile for each, leaving those hauling ninety-nine or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the Legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

Reversed.

SOUTHERN PACIFIC CO. *v.* BOARD OF RAILROAD COMMISSIONERS.

CIRCUIT COURT OF THE UNITED STATES, 1896.

[78 *Fed. Rep.* 236.[1]]

THE Southern Pacific Company is a corporation organized under a special act of the legislature of Kentucky, and operating, under leases, a number of railroads, in California and other States and Territories, constituting its Pacific System.

On September 12 and 13, 1895, the board of railroad commissioners of California, acting under the powers conferred on it by section 22, art. 12, of the constitution of California, and by the act of the legislature of April 15, 1880, passed two resolutions, the first of which, adopted unanimously, and known as the "Grain Resolution," was as follows:

"Resolved, that the rates at present existing for the transportation of grain in California, by the Southern Pacific Company, and its leased lines, as established by grain tariff No. 2 and all subsequent amendments thereto, be, and the same are hereby, reduced 8 per cent; and the secretary of this board is hereby directed forthwith to prepare for publication by this board a schedule of rates in accordance herewith; and, when so prepared, the same shall be published at once, and take effect as soon thereafter as allowed by law, and that on the adoption of the revised general freight tariff of said company, herein provided for, any further per cent deduction due said grain tariff, as provided herein, shall be given."

The second, adopted by the votes of Commissioners La Rue and Stanton, against the vote of Commissioner Clark, and known as the "25 Per Cent Resolution," was as follows:

"Resolved, that the present rates of charges for the transportation of freights in California by the Southern Pacific Company and its leased lines are unjust to the shippers of the State. Therefore be it resolved, that the present rate of charges for the transportation of freights in California by the Southern Pacific Company and its leased liens be subjected to such an average reduction as, including all reductions made therein since December 1, 1894, shall equal an average reduction of 25 per cent upon said rates, as in existence on said December 1, 1894. Resolved, that this board proceed at once to adopt a revised schedule of rates in accordance herewith, in order that the same may be in force on or before January 1, 1896. And be it further resolved, that, if the necessities of the case so require, this board will at once proceed to the ascertainment of the proportion of the reduction due any commodity which, by reason of its nature, requires to be

[1] This case is abridged. — ED.

moved between now and the time herein fixed of the taking effect of said general reduction."

On October 14, 1895, the Southern Pacific Company filed its bill against the board of railroad commissioners, seeking to enjoin the enforcement of these resolutions, and obtained a temporary restraining order, with an order to show cause why it should not be continued. The United States also intervened in support of the prayer for an injunction; and affidavits and other proofs were submitted by all parties, with full arguments upon the question of the continuance of the injunction.

McKenna, Circuit Judge. . . . The attorney general says that he can demonstrate, beyond the possibility of a plausible explanation, that complainant has failed to make such a showing as would entitle it to the relief prayed for, even if the 8 per cent and 25 per cent reductions could, under any circumstances, be considered jointly. On the other hand, Mr. Herrin says that complainant is not asking for a single dollar of dividend, because existing rates and business are not sufficient to earn dividends. It only seeks revenue enough to pay interests on bonds, to pay operating expenses, and to pay taxes. Present rates, under the experience of 1894, were insufficient for such payment. The elements of the controversy will be stated as we proceed. It may, however, be premised here that Mr. Justice Brewer said in the Dey case: "Compensation implies three things, — payment of the cost of service, interest on bonds, and then some dividend;" "adequate dividend," subsequent cases say. These, then, are the factors of compensation to be applied.

Complainant's bill, after a somewhat detailed statement of the amounts payable by complainant under the leases to it, gives a summary of the receipts and expenditures, which shows a deficiency on the Pacific System for the year of 1894 of $276,262.70; for 1895, $1,476,176.39. In the amendment to the bill there is an exhibit of the receipts and expenditures of the California roads of the system, showing a surplus for 1894 of $434,497.05; for 1895 (ending June 30), a deficit of $863,691.29. The attorney general claims that this showing is incorrect, for three reasons: (1) Because there is included a deficit of the Oregon & California road, in the sum of $541,355.71; (2) because there are included in expenditures on the various roads, for improvements and betterments, the sum of $654,826.81; (3) because there is included in expenditures, as operating expenses, the rent paid to the California Pacific road, in the sum of $600,000. If the last (third) be good, it is conceded that the deficit on the Pacific System, including the other objected items, will amount to $24,131.20. If not good, the deficit will amount to $54,905.65. For the time being, I will assume this objection to be good, and will consider the other objections.

Is the deficit of the Oregon & California road a proper expenditure of complainant, which resulted from the insufficiency of the income to

pay the interest on the bonded debt? This, of course, depends upon the terms of the lease from the Oregon & California Company. It provides that the Southern Pacific Company shall pay to the Oregon & California Company, on account of the road, from the income received from it, as follows: The cost of operating such road and incidental expenses connected therewith, and "shall apply the residue of the amount of net income and earnings of said railroads to such extent as shall be required for the purpose, to the payment of the interest, . . . upon the now existing bonded indebtedness." The lease also provided that "on the 1st of May of each year the Southern Pacific Company shall pay to its lessor such balance, if any, of the net income for the year ended the 1st of December preceding, as shall remain in its hands after all the payments for interest . . . agreed to be made or paid." It is, however, further provided that, if the net income be insufficient to pay in full such current interest for the year, it shall be optional with the Southern Pacific Company to advance or pay for account of the Oregon & California Company such deficiency. If, however, it do so, it shall be entitled to interest thereon, at 6 per cent per annum, until reimbursed, and shall be entitled to pay itself out of subsequent earnings or income of the demised premises, and have a lien thereon, and on such income.

It is objected that the payment of the deficit was optional, and again, because the amount paid is secured upon future revenues and on the demised premises. In other words, it was not a "payment," in any proper sense, by the Southern Pacific Company for which it could charge. Interest on bonded debt is held by all authorities to be a proper charge upon income, and hence, if the Oregon & California Company had operated its road, such interest could be claimed by it, — deficiency of income to pay such interest would be a loss to the company. But that is not the test. We have already seen (and important consequences follow from it) that the board of railroad commissioners dealt with the Pacific System — dealt with the Southern Pacific Company, as operating that system — not any individual road, but all the roads; and hence the regulation of the board must be tested by the revenues of all the roads, not by the revenue of one. It is not what the Oregon & California Company might show, or what the Southern Pacific Company might show, for the operation of that road alone, but what it may show as to the system. This being so, the conclusion is obvious. Was the payment of the interest a loss to the Southern Pacific Company? Clearly not. It is secured to it, and is to be reimbursed to it, and is charged in the report as a "balance deficit payable by Oregon & California Railroad Company." Clearly, again, if it had not been paid, it could not be claimed as a loss. If paid, and to be reimbursed and secured, it cannot be claimed as a loss, if the debtor or the security be good. I cannot assume now that the debtor or the security will not be good. It may be, of course, that it will not be good, but I can only deal with present

conditions, or, at any rate, with those likely to occur within a reasonable period of time. That, under the lease, the payment of the deficit is not a charge on the Southern Pacific Company, is not only evident from its terms, but evident from the allegations of the bill.

The second ground of objection, that is, that to improvements and betterments, there will have to be considered — First, the abstract legality of such a charge; and, second, the competency of it under the leases. The abstract legality of such charge is established by the Reagan Case. The same contention was made there, and a deduction of the sum of $302,085.77 was claimed to have been charged to operating expenses, whereas it was expended for "Cost of road, equipment, and permanent improvements." Mr. Justice Brewer, commenting on the claim, said:

"Again, the sum of $302,085.77 appears in that table, under the description 'Cost of road, equipment, and permanent improvements, admitted to have been included in operating expenses,' and is added to the income as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails except as included within this amount. Now, it goes without saying that, in the operation of every road, there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of 'Renewals of rails and ties,' is stated the number of tons of 'New rails laid' on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, &c. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company."

Substantially to the same effect is Union Pac. Ry. Co. *v.* U. S., 99 U. S. 402. In the latter case the court was called upon to interpret that clause of the act of 1862 in aid of the construction of the Union Pacific Railroad which provided that "after said road is completed, and until said bond and interest are paid, at least 5 per cent of the net earnings of said roads shall also be applied to the payment thereof." It may be said that there were several elements in that case which are not in the case at bar, but, nevertheless, the remarks Mr. Justice Bradley makes are substantially applicable. Speaking of when a railroad is completed, he said:

"In one sense, a railroad is never completed. There is never, or

hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail or iron bar, laid on wooden stringpieces, resulting in what was known in former times as 'snake heads'; the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail, and, finally, the H rail, which itself passed through many successive improvements. Finally, steel rails, in the place of iron rails, have been adopted as the most perfect, durable, safe, and economical rails on extensive lines of road. Bridges were first made of wood, then of stone, then of stone and iron. Grades originally crossed, and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over or under intersecting roads. A single track is all that is deemed necessary to begin with; but now no railroad of any pretensions is considered perfect until it has, at least, a double track. Depots and station houses are, at first, mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first-class railroad."

And, declaring what are proper expenditures, he further said:

"Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earnings in order to arrive at the 'net earnings,' as this expression is to be understood within the meaning of the act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before;

whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the despatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed. . . . We are disposed to agree, therefore, with the judge who delivered the concurring opinion in the court below, that the twenty-seventh item of expenditure, as stated in the table of expenses in the eighteenth finding, entitled 'Expenditures for station buildings, shops,' &c., is a charge that may properly be made against earnings; since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account."

The same idea is variously illustrated in the following cases: U. S. *v.* Kansas Pac. R. Co., 99 U. S. 455; St. John *v.* Railway Co., 22 Wall. 136; Railroad Co. *v.* Nickals, 119 U. S. 296, 7 Sup. Ct. 209; Warren *v.* King, 108 U. S. 389, 2 Sup. Ct. 789; Mobile & O. R. Co. *v.* State of Tennessee, 153 U. S. 495, 14 Sup. Ct. 968; Barnard *v.* Railroad Co., 8 Allen, 512; Minot *v.* Paine, 99 Mass. 106, 107; Railway Co. *v.* Elkins, 37 N. J. Eq. 273; Dent *v.* London Tramways Co., 16 Ch. Div. 344.

The order of the court, therefore, is that that part of the order staying the execution of the resolution of the board of railroad commissioners, reducing rates on grain 8 per cent, be continued until the further order of the court; that the balance of the restraining order be dissolved.

GLOUCESTER WATER SUPPLY CO. *v.* GLOUCESTER.

SUPREME COURT OF MASSACHUSETTS, 1901.

[179 *Mass.* 365.[1]]

PETITION to determine the value of the petitioner's water plant purchased by the respondent on September 24, 1895, under St. 1895, c. 451, § 16, filed October 29, 1895.

Commissioners were appointed under the provisions of the act, who reported that the value of the plant, exclusive of any allowance for the franchise and rights other than the water rights of the company, and excluding all evidence as to the past earning capacity of the company, was $600,500, and that the petitioner should recover that amount with interest from September 24, 1895, less the sum of $3,955.40, which it was agreed should be deducted therefrom.

LORING, J. . . . It will be convenient to consider the respondent's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of duplication of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 451) is an act enabling the city of Gloucester to "supply itself and its inhabitants with water." By § 16 of that act, that right is made conditional on its, the city's, purchasing the property of the water company in case the water company elects to sell its property to the city. In case the city agrees to buy the water company's property, under an offer of the water company made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof. . . . Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company."

In determining the true construction of these provisions of § 16, it is important to bear in mind the purpose, which the Legislature had, in making the right of the city to supply itself with water conditional on its buying the company's property, in case the company elected to sell it to the city, and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of future earning capacity, or future good will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the Legislature had not required the city to buy the

[1] This case is abridged. — ED.

water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in § 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company. The company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property, which the city is compelled to buy, ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the past earnings of this company were not evidence of the "fair value" of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a criterion of the "fair value" of the property apart from an exclusive franchise. We are of opinion that the evidence of past earnings offered by the water company was properly excluded. Newburyport Water Co. *v.* Newburyport, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 370, § 12, which provides that in determining the "fair market value" of a gas or electric plant under similar circumstances "the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value;" but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the commissioners proceeded were sufficiently favorable to the water company.

It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than "the cost of duplication, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Waterworks Co. *v.* Kansas City, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of § 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value which, as we have seen, in fact exists. The provisions of the act are that the "fair value . . . shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the $75,000 allowed by them in addition to the cost of duplication, less depreciation, of the plant in its physical features, did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant, . . . does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it." *Report affirmed.*

BRYMER *v.* BUTLER WATER CO.

SUPREME COURT OF PENNSYLVANIA, 1897.

[179 *Pa. St.* 231.[1]]

WILLIAMS, J. . . . A provision in the third section of the Act of June 2, 1887, relating to the jurisdiction of the courts over gas and water companies is supplemental to the Act of 1874, and defines somewhat more distinctly the duty of such companies to furnish the public with pure gas and water, but it contains no allusion to the subject of price. The power of the court to interfere between the seller and the buyer of water is conferred only by the provisions already quoted from the Act of 1874; and that act authorizes the court to entertain the

[1] This case is abridged. — ED.

complaint of the buyer, to investigate the reasonableness of the price charged, and to "dismiss the complaint," or to order that the charges complained of, if found to be unreasonable and unjust, "shall be decreased." The water company prepares its schedule of prices in the first instance, and makes its own terms with its customers; but if these are oppressive, so that in the exercise of the visitorial power of the State the just protection of the citizen requires that they be reduced, then the court is authorized to say "this charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate." This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its dealings with the public. It may be that the power to order that any particular item of charge shall "be decreased" includes the power to fix the extent of the reduction that must be made, or to name the maximum charge for the particular service in controversy, which the court will approve, but the decree is that the item shall "be decreased" either generally or to a sum named. The schedule of charges must be revised accordingly by the company defendant, and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases.

We do not think this supervisory power would justify the court in preparing a tariff of water rents and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property, and the business of a solvent corporation, from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges specifically pointed out and complained of by petition. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money

should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment. This whole subject was brought to the attention of the learned judge by a request that he should find as a matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request, "we have no authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction."

This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other. The law was correctly stated in the defendant's request, and the court was in error in refusing it. But we think the court had no power to adopt for, and enjoin upon, the company a comprehensive schedule like that incorporated into the decree in this case. The decree found that the water supply furnished by the defendant company was abundant and "reasonably pure and fit for public use," but, without any adjudication that any particular charge or charges complained of were excessive and must be decreased, he made a decree that "the water rates of the defendant company from March 1, 1896, to be charged and collected from the plaintiffs for water by the defendant company to the plaintiffs shall be as follows:" Then follows a table filling two and a half pages of the appellant's paper-book, and providing specifically for domestic rates, for livery, hotel, and trading stables, for hotels and boarding houses, for fountains, steam engines, schools, motors, public buildings, special rates, and meter rates, subject to provision that "when the water" which the same decree had just pronounced to be reasonably pure and suitable for domestic use

"is properly filtered the charges may be increased twenty per cent." The school district of Butler was not a party complainant in this case, nor was the county of Butler, but both were taken under the protection of the court and specifically provided for by the decree. Fountains are luxuries. The question whether the police power of the State can be successfully invoked to cheapen the price of water furnished for purposes of display or the mere gratification of one's taste, is at least open to discussion, but, without discussion, it is disposed of by this decree, and the price reduced. In short, upon a general complaint that the rates charged by the defendant were too high, without specification of the particular charges that were alleged to be excessive, the court has undertaken to revise the entire schedule of prices, and instead of directing the company to decrease the objectionable charges, has formulated an entirely new schedule of prices, covering all of the business of the company. This new schedule it has framed upon the mistaken basis adopted and stated in the third conclusion of law already considered. This action is not authorized by the Act of 1874. It is not the hearing of a complaint against the charges made by the company and a decision of the controversy so arising, but it is the assumption of a power to frame a schedule of prices covering the entire business of the company, with all its customers, many of whom are not even complaining of the rates paid by them. The framing of such a general schedule is ordinarily the right of the company. The correction of this schedule when framed, whenever it may work injustice and hardship is the prerogative of the court, and one which should be fearlessly exercised.

For reasons now given this decree cannot be affirmed, but under the peculiar circumstances surrounding this case we cannot enter a simple decree of reversal.

STEENERSON *v.* GREAT NORTHERN RAILWAY CO.

SUPREME COURT OF MINNESOTA, 1897.

[69 *Minn.* 353.[1]]

THE plaintiff, Elias Steenerson, in 1893 filed a complaint with the Railroad and Warehouse Commission, complaining that the tariff of charges of the Great Northern Railway Company for the transportation of wheat, oats, barley, and other grains from Crookston, Fisher, and East Grand Forks, to the terminals Minneapolis, Duluth, and St. Paul, were unjust and unreasonable, in that they were at least one-third too high, and asked that the same be reduced to and fixed at twelve cents per hundred pounds between Crookston and either of said terminals,

[1] This case is abridged. — ED.

and between other stations on said railway and said terminals in proportion, or to a just and reasonable rate. The defendant company made answer to such complaint, admitted the existence of charges as alleged in the complaint, and alleged that its rates and charges, "including those in question," were in all respects reasonable and just.

MITCHELL, J. . . . 1. It must now be accepted as the settled law that, when rates of charges by railway companies have been fixed by the legislature or a commission, the determination of the question whether such rates are "reasonable" or "unreasonable" is a judicial function. But this is so, not because the fixing of rates is a judicial function (for all the authorities agree that it is a legislative one), but solely by virtue of the constitutional guaranty that no one shall be deprived of his property without due process of law. Therefore the only function of the courts is to determine whether the rates fixed violate this constitutional principle.

Courts should be very slow to interfere with the deliberate judgment of the legislature or a legislative commission in the exercise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution. It is not enough to justify a court in holding a rate "unreasonable," and hence unconstitutional, that, if it was its province to fix rates, it would, in its judgment, have fixed them somewhat higher. Any such doctrine would result, in effect, in transferring the power of fixing rates from the legislature to the courts, and making it a judicial, and not a legislative, function. When there is room for a reasonable difference of opinion, in the exercise of an honest and intelligent judgment, as to the reasonableness of a rate, the courts have no right to set up their judgment against that of the legislature or of a legislative commission. In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory. This seems to be substantially the doctrine suggested in Spring *v.* Schottler, 110 U. S. 347–354, 4 Sup. Ct. 48, which, so far as I can discover, is the first case in which that court suggested any modification or limitation of the doctrine of the so-called "Granger Cases." And I think it is the doctrine which the courts must finally settle down on, unless they are prepared to assume the function of themselves fixing rates.

2. What is a reasonable rate is a most difficult question, and it is doubtful whether any single rule for determining it can be laid down that would be complete, and alike applicable to all cases. But as good a general rule as I have found is that stated by counsel for the Northern Pacific Railway Company in this case, to wit:

"If a railroad is built and operated wisely and economically; if it is located where public need requires it, where there is business to justify its existence, and constructed so as to be fit and well adapted for the

business which it aims to accommodate, — it should be entitled to return as good interest [on the cost of the reproduction of the road] as capital invested in the average of other lines of enterprise."

It seems to me that it follows, as corollaries from this rule, that — First, the cost of reproduction must be estimated on a present cash basis, and that it can make no difference whether a road was originally built with cash capital paid in by the stockholders, or with borrowed money secured by mortgage on the property; and, second, a rate may be reasonable during times of general financial and business depression, when capital invested in all lines of enterprise is yielding a small return, which would be unreasonable in prosperous times, when capital invested in business enterprises is yielding a much larger return. There is no constitutional principle which guarantees the capital invested in railroads immunity from business vicissitudes to which capital invested in all other enterprises is subject. These propositions are fully discussed in the opinion. The courts should take notice of the general depression in business prevailing in 1894.

3. Where capital (including labor) invested in the production of any article or commodity is comparatively unremunerative, yielding but a small return, a rate for the transportation of such article or commodity may be reasonable, although, if the carrier was required to do all his business, at rates fixed on a corresponding basis, such rates would be unreasonable, to the extent of being confiscatory. This is but an enlarged application of a principle already suggested. It is a principle upon which railroads themselves act every day in fixing rates, recognizing as they do that rates are largely dependent upon competition among producers or shippers. Of course, this proposition has its limitations, but it is unnecessary to discuss them here. The courts, I think, should take notice of the small profit in raising grain in Minnesota in and about 1894, owing to the comparatively low prices then prevailing.

I will not go into any discussion of the evidence, or any analysis of the labyrinth of figures and estimates presented in the testimony. That has been very exhaustively, and, as I think, correctly, done by Justice CANTY. Applying the rules I have suggested to the evidence, I do not think any court would be justified in holding that the railroad company has satisfactorily proved that the rates fixed by the commission for the transportation of grain are "unreasonable;" that is, if enforced, they would be confiscatory.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT CO. *v.* CITY OF MILWAUKEE.

CIRCUIT COURT OF THE UNITED STATES, 1898.

[87 *Fed.* 577.[1]]

FINAL hearing in two actions, — one wherein the street railway company is complainant, and the other brought by the trustee for the bondholders, — each seeking a decree declaring null and void, in respect of the complainant, a purported ordinance of the defendant city entitled "An ordinance to regulate the rate of fare upon the street railways in the city of Milwaukee, and providing for the sale of packages of tickets thereon," approved June 11, 1896, and to perpetually enjoin its enforcement.

SEAMAN, District Judge. . . . The difficulties presented in this case do not, therefore, rest in any doubt as to the general principles which must be observed, nor in ascertaining the actual facts disclosed by the testimony as a whole, so far as material to this controversy. Although the testimony on the part of complainant makes a volume of 1,445 printed pages, and that of the defendant 163 pages, the only substantial contentions of fact relate to items of expenditure and claims of credit by way of depreciation, presented on behalf of the complainant as entering into the showing of net revenue, and to the present or reproduction value of the plant. And it may be remarked, in passing, that this testimony is so well classified and indexed, with such fair summaries in the briefs, that the task of examination has been materially lightened. But the sole embarrassment in the inquiry arises from the wide divergence which appears between the actual and undisputed amount of the cash investment in the undertaking, and the estimates, on either hand, of the amounts for which the entire plant could now be reproduced, in the view that the line of authorities referred to does not attempt to define or specify an exact measure or state of valuation, and leaves it, within the principles stated, that "each case must depend upon its special facts." Therefore the twofold inquiries of reasonableness above indicated are of mixed law and fact, and start with the presumption, in favor of the ordinance, (1) that the prevailing rates exacted too much from the public, and (2) that those prescribed are reasonable.

1. Are the terms and rates fixed by the company excessive demands upon the public, in view of the service rendered? The Milwaukee Street Railway Company, of which the complainant is the successor in interest, was organized in December, 1890, for the purpose of establishing an electric street railway system, which should cover the entire field for the city of Milwaukee. There were then in operation

[1] This case is abridged. — ED.

five distinct lines, owned separately, operated mainly by horse or mule power, each charging separate fares, and having no system of transfers. It is conceded that the service was slow and antiquated, was not well arranged for the wants of the city, and was generally inadequate and unsatisfactory. As the old lines occupied the principal thoroughfares, and the public interest prevented the allowance of double lines in such streets, the improvement could not be made effective unless those lines were purchased, or in some manner brought into the proposed system. They were gradually acquired, at prices which may appear excessive when measured by results, and during the ensuing period of about three years the work of installing the new system was carried on, involving an entire reconstruction and rearrangement of the old lines and extensions, and new and improved equipments throughout, at an expenditure of over $3,000,000, aside from the cost of the old lines. As a result, at the time the ordinance was adopted, the mileage of tracks had increased from the previous aggregate of 110 miles to 142.89 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system, — a feature of special value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement. The service was improved in speed and regularity 50 per cent or more, with better cars and less inconvenience, and it appears beyond question that it was generally more satisfactory and economical from the standpoint of the public. In other words, the service was materially enhanced in its value to the public, without any increase in either normal or maximum charges, affording rides for five cents which had previously cost two and even three fares; and against all these advantages there appears only a single benefit extended by three out of the five constituent companies which is not given under the new arrangement, namely, in the sale of commutation tickets, — an omission for which there seems to be plausible excuse and offset in the universal system of transfers, aside from the other advantages. Surely, therefore, no imposition upon the public appears through any comparison between the old and the new service and rates. Nor does it find any countenance in comparison with either service or rates which prevail in other cities, for it is shown in this record, and is undisputed, that the five-cent rate is almost universal; that commutations are exceptional in cities of like class, and arise out of exceptional conditions, which are not fairly applicable here; and that instances of lower rates are so clearly exceptional that they cannot have force for any affirmative showing of reasonableness in the instant case. Nevertheless, with the burden of proof on the defendant, these considerations are not controlling, unless it further appears that the earnings of the company are insufficient, in view of the amount which may justly be regarded as the investment in the undertaking, to warrant the making of rates and terms which are more advantageous to the public. The interests of the public in its highways are paramount, and, if the service

can reasonably be afforded more cheaply in Milwaukee than in other cities of like class, the community is entitled to the just benefit of any possible conditions which may tend to that result. The issue in that regard must be met under the second branch of inquiry, but I am clearly satisfied that this first question must be answered in favor of the complainant, if the evidence sustains its claim that lower rates would be confiscatory, and not compensatory.

2. Are the earnings of the property insufficient, in view of all the conditions, to justify this reduction in the rates of fare? Solution of this inquiry depends upon the showing (1) of earning capacity at existing rates, and (2) of the "amount really and necessarily invested in the enterprise," and upon the conclusion (3) whether the ratio of return upon the investment is excessive. In the statements which are referred to both parties have adopted a ratio, so far as necessary, to separate the electric lighting plant owned by the complainant, so that the statements which follow relate exclusively to the street railway plant, except where otherwise mentioned.

First. The question of earning capacity is confined by the testimony to the results of three years' operation, being after the system was fairly installed, and inclusive of the year in which the ordinance was adopted, namely, 1894, 1895, and 1896. It is suggested on behalf of the defendant that those years were exceptional, for one cause and another, and are not a fair criterion for future earnings under more favorable circumstances; but the suggestion is without force in this case, because the ordinance operates upon these very conditions, and must, of course, be predicated upon them, — upon existing facts, and not upon mere future possibilities, — and, so determined, the instant case cannot affect rights under new conditions.

The proofs on the part of the complainant furnish, in detail, from the books of account, the gross earnings, the various items of expense and of charges for which deduction is claimed, excluding any payments of, or allowance for, interest on the bonded indebtedness, and state the net earnings as follows: In 1894, $64,868.77; in 1895, $269,202.30; in 1896, $100,628.81. In this showing it appears that deduction of $247,324.88 is made in 1894 for "depreciation," being the amount apportioned in that year to meet the alleged annual loss by physical depreciation of the plant, to keep the capital intact. No such deduction is made in 1895 and 1896, because not shown in the books, although it is insisted that like credit is due in each year, for the purposes of this case.

The defendant concedes the correctness of the showing as to the gross earnings, but disputes certain large items for which deductions are made in the above statement, corrects some items, and denies that any allowance should be made for depreciation. Aside from the fact that reports and statements of financial condition made from time to time by the company omit many of the deductions here asserted, these contentions on the part of the defendant rest solely upon the books of

account kept by the company, and the testimony of Mr. De Grasse, stating his conclusions as an expert accountant from examination of such books, with the following result as to net earnings: In 1894, $387,074.70; in 1895, $479,621.11; in 1896, $66,520.99. But this total for 1896 erroneously includes an allowance of $160,550 paid for interest on bonds, which should be excluded on the basis assumed, and would make the net earnings for that year, on his computation, $227,070.99. In this statement the allowance for depreciation in 1894 is excluded by Mr. De Grasse, because that item was in fact charged off upon change in the system of bookkeeping. He also excludes large amounts of undoubted expenditures upon the hypothesis that they belong to "construction account," as covering permanent improvements, and not to "expense of maintenance," as stated; rejects certain payments as accruing on account of previous years, and certain sums apportioned and charged off to meet damage claims; and makes corrections as to taxes, for which the book entries were made in advance upon estimates by way of apportioning the expenses of the year, pending litigation and other causes. However valuable this testimony is for analysis of the bookkeeping methods and for correction of certain charges, it is clearly insufficient, without other support, to contradict the undisputed testimony, both positive and expert, on the part of complainant, which verifies substantially its contention upon the disputed subjects of deduction, namely, that the expenditures so charged were largely, if not wholly, of such nature as to justify deduction for "maintenance;" and that depreciation is a well-recognized fact in all such plants, for which allowance must be made to save the capital from impairment, without regard to any question of its entry upon the books.

Making allowances for maintenance alone, in accordance with the analysis presented by the expert witnesses Goodspeed, Coffin, McAdoo, and Beggs, taking in each instance the estimate most favorable to the defendant, I am satisfied that the defendant's claim of net earnings must be materially reduced, and that the largest amounts which can be assumed upon its theory, excluding any allowance for depreciation (except that for 1894 the "maintenance" allowance is increased, to bring it — the general allowance — up to the minimum estimate by the experts), would approximate the following sums:

In 1894	$230,000
In 1895	340,000
In 1896	115,000
	$685,000

— making the average earnings per year, say, $228,333.

In reference to the element of depreciation, the witness Beggs gives the following explanation:

"I think experience has demonstrated that the utmost life that can be expected from the best road-bed that can be laid to-day would be,

at the outside, ten to twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition today, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year, — in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed twelve years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years, — I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain — to operate — the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment."

For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance. I am, however, clearly of opinion that neither of these elements is essential to the determination of the issues upon any aspect presented by the testimony, and that depreciation may be left to serve as an important factor of safety, in either view.

Second. As to valuation: For purposes of the company, the value of the property, including both railway and lighting plants, appears to have been placed at $14,250,000, represented by the issue of bonds for $7,250,000; preferred stock, $3,500,000; and common stock $3,500,000; but this aggregate was clearly excessive, after excluding the electric lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that

payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone, — in two statements in which the stock is excluded, and in one statement which values both stock and bonds, — the minimum being $9,024,107.85, and the maximum $11,313,829.84. The former amount was subsequently modified (page 465, Complainant's Proof), making the statement of cost $8,885,644.17; and as this excludes any valuation of stock, and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control. On the other hand, both parties introduce testimony placing valuations upon the various items of the plant as it exists in fact, upon the basis of its reproduction value. This amount, as stated by the witnesses for complainant, aggregates $5,153,287.76; while, on the face of defendant's proofs, the value of the tracks and equipment is placed at $2,358,799; the real estate and buildings being valued separately, and the highest valuation of the real estate being $236,949, and of the buildings $208,449, making the aggregate $2,804,197. It appears, however, that these estimates on behalf of the defendant omit 27 miles of track, many parcels of real estate, and other items, so that counsel for defendant concedes that this aggregate should be increased to $3,679,631. The wide difference in these amounts is mainly due to divergence in the estimates upon tracks and equipment. So the amounts on real estate and buildings, after allowance for the omissions, would appear higher on the valuations submitted by the defendant than those of the other side. For the valuation of tracks and equipment, the defendant relies upon the estimate made by Mr. Partenheimer, a witness of apparent ability and experience as a street railway contractor, engaged in business at Chicago; but his examination of the plant was cursory, being made within three days, and could not give the detailed information upon which a just estimate for this inquiry must be based, and it is conceded that he left out of consideration many important items (aside from the error in mileage) which should enter in and would greatly increase the amount as estimated on his basis. Both upon its face and by reference to other source of information, this estimate is far below any fair valuation, for the purpose in view, either at the sum stated by the witness, or with the additions conceded on behalf of the defendant; the former amount being in fact $320,000 short of the actual cash expenditures by the company for construction and equipment. Opposed to this, the estimate for complainant is made by Mr. Clark, an expert of distinction in this line, who gave weeks to the examination, with the aid of a corps of assistants, and presents the results in detailed statements, so that his testimony and estimates impress me as well founded: and they are supplemented and supported by the testimony of Mr. Coffin, Mr.

Payne, and other witnesses, and by comparative showing of mileage valuations in Massachusetts, which appear in the noteworthy system of reports published by that State. I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding $5,000,000. And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instance appears in the fact that the electric motor which then cost about $2,500 can now be obtained for $800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be gauged by the present cost of reproduction. Of the $5,000,000 and over paid for the acquisition of the old lines, it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly $9,000,000. How much of this may be defined or apportioned as the amount which was both "really and necessarily invested in the enterprise" (*vide* Road Co. *v.* Sandford, *supra*) I have not attempted to ascertain, except to this extent: that I am clearly of opinion that at least $2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in reference to the remaining $1,885,644.

Third. The final inquiry, whether the net earnings shown are in excess of or equal to a just return upon the investment, presents no serious difficulty, under the premises above stated. Assuming $5,000,000 as the basis of investment, the ratio of earnings would be as follows: (1) At the extreme computations of defendant, the yearly average would be $364,000, which would yield .072 per cent; (2) at the complainant's figures, after adding the corrections for taxes, the return would be .033 per cent; (3) at the amounts which are above stated as my deductions from the testimony, the yearly average, being $228,333, would make .045 per cent. Assuming $7,000,000 as the basis, the ratio of earnings would be, upon each of said versions, as follows: For the first, .052 per cent; for the second, .023 per cent; for the third, .032 per cent.

The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent for real estate mortgages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent above that, with the large margin for depreciation left out of account.

I am of opinion that the testimony is not only convincing in support of the material allegations of the bill, but is uncontradicted and conclusive that the improved service received by the public, with the universal system of transfers, is well worth the five-cent rate charged therefor; that the company has not received earnings in excess of an equitable allowance to the investors for the means necessarily invested in furnishing such service; that enforcement of the ordinance would deprive complainant of property rights, by preventing reasonable compensation for its service; and that, therefore, the ordinance clearly violates the Constitution of the United States, and is invalid. Decree must enter accordingly, and for an injunction as prayed in the bill.

METROPOLITAN TRUST CO. *v.* HOUSTON AND TEXAS CENTRAL RAILROAD CO.

CIRCUIT COURT OF UNITED STATES, 1898.

[90 *Fed. Rep.* 683.[1]]

MCCORMICK, Circuit Judge. . . . The Houston and Texas Central Railroad Company, the successor to the Houston and Texas Central Railway Company, has a mortgage indebtedness equal to about $34,000 to the mile of its main line, and has stock outstanding to the amount of $10,000,000, making its stock and bonds equal to the sum of about $53,000 to the mile of its main line. The bill in this case avers that the defendant company and its predecessor company have necessarily expended in cash in the construction and equipment and betterment of the lines of the defendant company about $62,000 per mile of its said railways; that the lines of railway of the defendant company have at all times been operated as economically as practicable; that its operating expenses have at all times been as reasonable

[1] This case is abridged—ED.

and low in amount as they could be made by economy and judicious management; that the company has at all times secured the services of its officers and employees as cheaply as practicable, and has employed no more than was necessary, and at fair and reasonable rates of pay; that it has at all times secured all supplies, material, and property of every character used in the operation of its railways at the cheapest market price, and at rates as low as the same could be secured, and has secured and used no more than was actually necessary for the operation of its railways. Substantially the same allegation is made in the cross bill, and both are affirmed and sustained by affidavits of competent witnesses offered on the hearing of this motion. The valuation placed upon the property of this railroad corporation by the railroad commission of Texas is, in round numbers, $21,000 per mile. This statement shows the vast difference between the estimates made by and on behalf of the railroad company and the estimates made by the railroad commission of the value of the railroad's property on which it is entitled to earn some profit. It seems to be clear from the answer of the commission, the tone of the affidavits which it offers in support of its answer, and the argument of the attorney-general and the assistant attorney-general who represented it on this hearing, that in estimating the value of this railroad property no allowance was made for the favorable location of the same, in view of the advance in prosperity of the country through which it runs, and the increment to its value due to the settling, seasoning, and permanent establishment of the railways, and to the established business and the good will connected with its business, which has been established through a long series of years, and all of which ought reasonably to be considered in fixing the value of the property and the capitalization upon which, at least, it is entitled to earn, and should pay, some returns by the way of interest or dividends. This is practically the oldest railroad in the State. A few miles of another road were built earlier, but this road, running throughout the whole course of its main line through what is now the most populous and best developed portions of the State, and still rapidly increasing in population and development, has established a business that would not and could not be disregarded in estimating the value of the railroad, if considered solely as a business property and venture. It cannot be so considered, because of its quasi-public nature. Its duties, its obligations, and its liability to control are elements that must be considered. As popularly expressed, the rights of the people — the rights of shippers who use it as a carrier — have to be regarded; but, as judicially expressed, these last have to be so regarded as not to disregard the inherent and reasonable rights of the projectors, proprietors, and operators of these carriers. It is settled that a State has the right, within the limitation of the constitution, to regulate fares. From the earliest times public carriers have been subject to similar regulations through general law administered by the courts, requiring that the rates for carriage should be reasonable.

having regard to the cost to the carrier of the service, the value of the service to the shipper, and the rate at which such carriage is performed by other like carriers of similar commodities under substantially similar conditions. But neither at common law nor under the railroad commission law of Texas can the courts or the commission compel the carriers to submit to such a system of rates and charges as will so reduce the earnings below what reasonable rates would produce as to destroy the property of the carrier, or appropriate it to the benefit of the public. The cost of the service in carrying any one particular shipment may be difficult to determine, but the cost to the carrier of receiving, transporting, and delivering the whole volume of tonnage and number of passengers in a given period of time must include, as one of its substantial elements, interest on the value of the property used in the service. In countries conditioned as Texas has been and is, such a railroad property and business cannot be reproduced, except substantially in the same manner in which this has been produced; that is, by a judicious selection of location, by small beginnings, and gradual advance through a number of years, more or less, of unproductive growth. The particular location of this road, of course, cannot be reproduced, and it cannot be appropriated by another private or quasi-public corporation carrier by the exercise of the State's power of eminent domain. And, even if the State should proceed to expropriate this property for the purpose of taking the same to itself for public use, the location of this road cannot be appropriated, any more than any other property right of a natural person or of a corporation can be appropriated, without just compensation. It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids that a State shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not improvidently constructed, and not improvidently operated may not be able, while charging reasonable rates for carriage of freight, to earn even the necessary running expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time

after the opening of their roads for business. This is true now of some of the roads, parties to these bills. At one time or another, and for longer or shorter times, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitations of the various communities through which they run, and by various encouragements offered by the State. The commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the "period of construction" mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to Austin in 1873, nearly twenty years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists to-day, may not be exactly accurate,— clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist to-day as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the service is rendered, cannot be reduced by the force of State law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited.

It seems to be contended that the case of the Houston and Texas Central Railroad Company fully justifies the action of the commission in its imposition of a system of rates, because, as it urged, it has made earnings over and above operating expenses sufficient to pay the interest on its outstanding bonds, and has a small surplus of a few thousand dollars in excess, as shown by its return to the commission of the operations of the year ending the 30th of June, 1898; in other words, it has paid interest on $34,000 of bonds to the mile. The return referred to is made on forms submitted by the commission, and under the item of "operating expenses" only ordinary repairs and replacements are allowed. In case an insufficient wooden bridge is replaced by an adequate iron bridge, that is treated as a betterment, and not permitted to figure in the returns as a part of the operating expenses. The bill and cross bill show that, if such betterments, which can only be made or procured out of the earnings of the road, were allowed in the return of operating expenses, the revenue earned

and rendered as net revenue would not have been equal, by several hundred thousand dollars, to the interest on the bonded indebtedness; that the bonded indebtedness outstanding against this road being in excess of the value fixed by the commission, to the extent of more than 50 per cent, the company has no means of providing for such betterments, if not at all allowed to charge them at any time against the gross earnings of the road. More than this, it is shown that the road has never at any time paid any dividend upon its stock. On the whole case, as made in the case of the Houston and Texas Central Railroad Company, it seems clear to me that the system of rates adopted and enforced by the commission does not afford to the owners of this property the equal protection of the law, and takes from the owners and stockholders the property they have therein, without just compensation, and that, therefore, the rates must be held to be unreasonably low, unjust, and confiscatory, and should not be submitted to, and cannot be suffered to be enforced. As already said, the case made for relief in each of the other suits seems to be stronger than the case of the Houston and Texas Central Railroad Company; and the evidence appears to me to show clearly that the system of rates imposed is, as to each of the roads, unreasonably low, unjust, and confiscatory. Therefore the prayer of the bill in each case is granted, to the extent of enjoining the roads from adopting the rates heretofore promulgated by the commission, and enjoining the commission and the attorney-general from enforcing the same, and enjoining all persons claiming thereunder from prosecuting the railroads, or any of the officers thereof, for the non-observance of the system of rates heretofore promulgated by the commission.

SMYTH *v.* AMES.

Supreme Court of the United States, 1898.

[169 *U. S.* 466.[1]]

Each of these suits was brought July 28, 1893, and involves the constitutionality of an Act of the Legislature of Nebraska, approved by the Governor April 12, 1893, and which took effect August 1, 1893. It was an Act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska and to provide penalties for the violation of this Act." Acts of Nebraska, 1893, c. 24; Compiled Statutes of Nebraska, 1893, c. 72, Art. 12. The act is referred to in the record as House Roll 33.

[1] This case is abridged. — Ed.

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company, and the Kansas City Company were defendants, it was adjudged in the Circuit Court — Mr. Justice Brewer presiding — as follows: "That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this State from one point to another therein, whereby such rate shall be reduced to those prescribed by the Act of the Legislature of this State, called in the bill filed therein, 'House Roll 33,' and entitled 'An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this Act,' approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in anywise obeying, observing, or conforming to the provisions, commands, injunctions, and prohibitions of said alleged act; and that the Board of Transportation of said State and the members and secretaries of said Board be in like manner perpetually enjoined and restrained from entertaining, hearing, or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants, or employees, done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered, or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the attorney-general of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, *mandamus*, civil action, or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining, and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this State, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed that the defend-

ants, members of the Board of Transportation of said State, may hereafter when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, adjudged, and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defendants constituting the State Board of Transportation, as well as by the defendants who are Secretaries of that Board.

Mr. Justice HARLAN. . . . It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the State of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater that in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the Circuit Court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court

should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the Legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business. . . .

In our opinion, the broad proposition advanced by counsel involves misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration

the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. Olcott *v.* The Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation *v.* Southern Kansas Railway, 135 U. S. 641, 657. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Covington & Lexington Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 596, 597, is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The Legislature has the authority, in every case, where its power has not been restrained by contract,

to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the Legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway

under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

Perceiving no error on the record in the light of the facts presented to the Circuit Court,

The decree in each case must be affirmed.[1]

[1] *Compare:* Water Works *v.* Schottler, 110 U. S. 347; Railroad Commission Cases, 116 U. S. 307; R. R. *v.* Illinois, 118 U. S. 557; R. R. *v.* Minn., 134 U. S. 418; Reagan *v.* Trust Co., 154 U. S. 362; R. R. *v.* Gill, 156 U. S. 649; Turnpike *v.* Sandford, 164 U. S. 578; Land Co. *v.* City, 174 U. S. 739. — Ed.

Section IV. Without Discrimination.

ANONYMOUS.

Common Pleas, 1558.

[*Moore*, 78, *pl.* 207.]

One came to an inn, and the innkeeper said to him, "Here are persons resorting to this house, and I know nothing about their behavior; therefore take the key of such a chamber and put your goods there at your own risk, for I will take no responsibility for them;" and afterwards the goods were stolen. The party brought action on the case against the innkeeper.

Wray. The innkeeper is responsible by the law for all the goods which come to his inn; and by the law he cannot discharge himself by such words.

Harper. We will demur.

Browne, J. Then we will quickly make an end of it.

Harper. My client has instructed me in this way, and I have no more to say.

Browne, J. You have the more to pay; the innkeeper may take issue, that the goods were not stolen by his negligence.

FITCHBURG RAILROAD *v.* GAGE.

Supreme Judicial Court of Massachusetts, 1859.

[12 *Gray*, 393.]

Action of contract upon an account annexed against Gage, Hittinger & Company for the transportation of ice from Fresh and Spy Ponds to Charlestown, over that portion of the plaintiff's railroad which was formerly the Charlestown Branch Railroad, and from Groton to Charlestown over that portion which has always been known as the Fitchburg Railroad. The case was referred to an auditor, to whose

report the defendants took exceptions presenting pure questions of law, and was thereupon reserved by *Bigelow*, J., for the consideration of the whole court, and is stated in the opinion.

S. Bartlett & D. Thaxter, for the defendants.

R. Choate & H. C. Hutchins, for the plaintiffs.

Merrick, J. This action is brought to recover the balance of the account annexed to the writ. The defendants admit the transportation for them of all the ice charged to them in the account, and that the several items contained in it relative to the service performed for them are correct. But they insist that the rate of compensation claimed is too large, and that the charges ought to be reduced. They have also filed an account in set-off, claiming to recover back the amount of an alleged overpayment made by them for similar services in the transportation of other quantities of ice belonging to them.

Their claim to be entitled to a diminution in the amount of charges in the plaintiffs' account, and to a recovery of the sum stated in their account in set-off, both rest upon the same ground. They contended and offered to prove at the hearing before the auditor, that while the plaintiffs were transporting the ice they were at the same time hauling over the same portion of their road various quantities of bricks for other parties; that ice and bricks were of the same class of freight, and that ice was as low a class of freight as bricks in regard to the risk and hazard of transportation; and that while they charged the defendants fifty cents per ton for the transportation of ice, they charged other parties only twenty cents per ton for a like service in reference to bricks.

The defendants contended that they were entitled to maintain their claim upon two grounds: first, under the provisions in the plaintiffs' act of incorporation; and, secondly, upon the general principle that as common carriers they were bound and required to transport every species of freight of the same class for any and all parties at the same rate of compensation; and that they had therefore no right to charge any greater sum for the transportation of ice than that for which they had actually carried bricks for other parties. Neither of the claims was sustained by the auditor, and he accordingly rejected the evidence offered in support of them. In both particulars we think his ruling was correct.[1]

It is contended on behalf of the defendants that the plaintiffs were common carriers; and that by the principles of the common law they are in that relation required to carry merchandise and other goods or chattels of the same class at equal rates for the public and for each individual on whose account service in this line of business is performed. There is no doubt they are common carriers. That is fully established. Thomas *v.* Boston & Providence Railroad, 10 Met. 472. Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. But by the law of this Commonwealth every railroad corporation is authorized to establish for their sole benefit a toll upon all passengers and property conveyed or transported on their railroad, at such rates as may be de-

[1] The decision upon the first ground is omitted. — Ed.

termined by the directors. Rev. Sts. c. 39, § 83. This right however is very fully, and reasonably, subjected to legislative supervision and control; a provision which may be believed to be sufficient to guard this large conceded power against all injustice or abuse. And in view of this large and unqualified, and therefore adequate supervision, the right of railroad corporations to exact compensation for services rendered may be considered as conforming substantially to the rule of the common law upon the same subject. This rule is clearly stated by Lawrence, J., in the case of Harris *v.* Packwood, 3 Taunt. 272: "I would not, however, have it understood that carriers are at liberty by law to charge whatever they please; a carrier is liable by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage; and not to extort what he will." This is the doctrine of the common law. 2 Kent Com. (6th ed.) 599. Angell on Carriers, § 124. And it supplies substantially the same rule which is recognized and established in this Commonwealth by the provisions of St. 1845, c. 191. The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could of course make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly then the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known and cannot therefore be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties.

There remains another question, the determination of which depends upon other and different considerations. The auditor, for the purpose of presenting the question to the determination of the court, rejected evidence offered by the defendants tending to prove that prior to the 22d of February, 1855, and down to that time, the plaintiffs had transported for them large quantities of ice from Groton at a much less rate of compensation than the amount charged in their account under date of the 31st January of that year, without having given them notice, and without their knowledge, of any intention to increase the charge for such service. This evidence was rejected, for the reason that the directors of the plaintiff corporation had, prior to the transportation of the ice in the last named item, fixed and raised the rate of transportation of ice on their road from Groton to ninety cents per ton. This evidence ought to have been received. In the absence of any special contract between the parties, it had a tendency to show what was the understanding between the parties on the subject, and what the defendants had a right to consider would be the price to be charged to them for services performed in their behalf. If not controlled, it would and ought to have had a material effect upon determining the question concerning the compensation which the plaintiffs were entitled to recover. It might have been controlled either by showing that the defendants did in fact have notice of the new rate of charge established by the directors of the company, or that the notice was communicated generally to all persons, in the usual and ordinary manner, and with such degree of publicity that all persons dealing with them might fairly be presumed to have cognizance of the change.

In this particular therefore the exception to the ruling of the auditor must be sustained; in all others, the exceptions taken to his decisions are overruled.

The case must therefore be recommitted to the auditor for the purpose of hearing the evidence rejected, and any other proofs which the parties may respectively produce relative to the items of charge under date of January 31st, and finding the amount which is due for the services there stated; but for no other purpose whatever.

Exceptions sustained.

MESSENGER *v.* PENNSYLVANIA RAILROAD COMPANY.

Supreme Court of New Jersey, 1873.
Court of Errors and Appeals of New Jersey, 1874.

[7 *Vroom* (36 N. J. L.), 407, 8 *Vroom* (37 N. J. L.), 531.]

Beasley, C. J. The Pennsylvania Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation is, that goods have been carried for other parties at a certain

rate below what the goods of the plaintiffs have been carried, and this suit is to enforce the foregoing stipulation. The question is, whether the agreement thus forming the foundation of the suit is legal.

There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear that, if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious, that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preferences can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter, and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition and the absence of monopolies. Consequently, the inquiry is of moment, whether such compacts may be made. I have examined the cases, and none that I have seen is, in all respects, in point, so that the problem is to be solved by a recurrence to the general principles of the law.

The defendants are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling to one dealer over another. It cannot be denied, that at the common law, every person, under identical conditions, had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. Nothing can be clearer than that, under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to those of another.

It is important to remark, that this obligation of this class of bailees is always said to arise out of the character of the business. Sir William Jones, importing the expression from the older reports, declares that this, as well as the other peculiar responsibilities of the common carrier, is founded in the consideration that the calling is a public employment. Indeed, the compulsion to serve all that apply could be justified in no other way, as the right to accept or reject an offer of business is necessarily incident to all private traffic.

Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants.

From these considerations, it seems to me, that testing the duties of this class of bailees by the standard of the ancient principles of the law, the agreement now under examination cannot be sanctioned. This is the sense in which Mr. Smith understands the common law rule. In his Leading Cases, p. 174, speaking of the liabilities of carriers, he says: "The hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same service." I am aware, that in the case of Baxendale *v.* The Eastern Counties Railway, 4 C. B. (N. S.) 81, this definition of the common law rule was criticised by one of the judges, but the subject was not important in that case, and was not discussed, and the expression of opinion with respect to it was entirely cursory. Indeed, the whole question has become of no moment in the

English law, as the subject is specifically regulated by the statute 17 and 18 Vict., ch. 31, which prohibits the giving "of any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." The date of this act is 1854, and since that time the decisions of the courts of Westminster have, when discussing this class of the responsibilities of common carriers, been devoted to its exposition. But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. This was so held in the case of Sandford *v.* The Catawissa, Williamsport, & Erie Railroad Co., 24 Penn. 378, in which an agreement by a railway company to give an express company the exclusive right to carry goods in certain trains was pronounced to be illegal. In a more recent decision, Mr. Justice Strong refers to this case with approval, and says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are "but declaratory of what the common law now is." This is the view which, for the reasons already given, I deem correct.

But even if this result could not be reached by fair induction from the ancient principles which regulate the relationship between this class of bailees and their employers, I should still be of opinion that we would be necessarily led to it by another consideration.

I have insisted that a common carrier was to be regarded, to some extent at least, as clothed with a public capacity, and I now maintain, that even if this theory should be rejected, and thrown out of the argument, still the defendants must be considered as invested with that attribute. In my opinion, a railroad company, constituted under statutory authority, is not only, by force of its inherent nature, a common carrier, as was held in the case of Palmer *v.* Grand Junction Railway, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended, that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede, that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are, unalterably, parts of the supreme authority, and in whatsoever hands they may be found,

they must be considered as such. In the use of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality. On these grounds, the contract now in suit must be deemed illegal in the very particular on which a recovery is sought.

The result is, the defendants must have judgment on the demurrer.

In the Court of Errors and Appeals, on error to the Supreme Court, the opinion of the Court was delivered by

Bedle, J.[1] The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good, to promote un-

[1] Part of the opinion is omitted. — Ed.

fair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted. . . .

It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade. This contract being clearly within it, and odious to the law in the respect on which a recovery is sought, cannot be sustained. But there is an additional ground upon which it is also objectionable. I entirely agree with the Chief Justice, that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a *quasi* public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are intrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it.

Every trust should be administered so as to afford to the *cestui que trust* the enjoyment of the use intended, and these railroad trustees must be held, in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable ability to perform the trust. In no other way can trade and commercial interchange be left free from unjust interference. On this latter ground, that part of the contract in question is illegal.

The judgment of the Supreme Court must be affirmed.

SILKMAN *v.* WATER COMMISSIONERS.

COURT OF APPEALS, NEW YORK, 1897.

[152 *N. Y.* 327.[1]]

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 3, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MARTIN, J. . . . The claim of the plaintiff, that the rents established by the defendant were not authorized by the act incorporating it, cannot be sustained. In broad terms, the act conferred upon the defendant the power to establish a scale of rents to be charged and paid for the use and supply of water, having reference to matters referred to in the statute, among which was the consumption of water. The objection made here is that the persons who consumed large quantities of water were not charged as much per hundred cubic feet as those who consumed a less amount. Under this statute the question of consumption was one of the elements to be considered in determining the rates. Surely, it cannot be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court interfering with them.

It follows that the decisions of the courts below were correct, and should be affirmed.

The judgment should be affirmed, with costs.

All concur. *Judgment affirmed.*[2]

[1] This case is abridged. — ED.

[2] *Compare:* Burlington Co. *v.* Fuel Co. 31 Fed. 652; Louisville Co. *v.* Wilson, 132 Ind. 517; Schofield *v.* Lake Shore R. R., 43 Ohio St. 571. — ED.

318½ TONS OF COAL.

District Court of the United States (Conn.), 1877.
Circuit Court of the United States, 1878.

[14 *Blatch.* 453.]

Libel *in rem* for freight and demurrage.

The libellants carried a cargo of coal to New Haven, to be delivered to the Glasgow Co. at the Canal Railroad Dock. The consignee was located near the line of the railroad in Massachusetts. It was the custom of the port for coal, thus consigned to a railroad wharf, to be shovelled from the hold of the vessel into large buckets, let down and hauled up by a steam derrick, which discharged them into the cars of the railroad. Prior to 1871, the shovellers who filled the buckets had been hired and paid by the master of the vessel. In that year the Canal Railroad Co. made a rule that it would thereafter supply all coal vessels with shovellers, at ten cents a ton, and that no vessel could discharge except by using shovellers thus supplied. Ten cents a ton was then the ordinary rate of wages for such services, but in 1876 charges of shovellers fell, and they could be hired for eight cents. The libellants thereupon hired shovellers at eight cents, and refused to receive those furnished by the company, unless they would work at the same rate. The company for this cause refused to allow the cargo to be unloaded, and it was discharged at a neighboring wharf, after some delay, and there libelled.

Shipman, J. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event, the contract of affreightment was complied with by the libellants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the Canal Dock. It is admitted that the company, upon notification that the coal was ready to be discharged,

replied that said cargo might be forthwith discharged, and would be received by it for the defendants.

The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used; (Croucher *v.* Wilder, 98 Mass. 322:) but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported, in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. . . . As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action." (2 Kent's Comm. 599.) A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. (Crouch *v.* L. & N. W. Railway Co, 14 C. B. 255.) The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable

times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier, for which he is responsible, and should be in his own control. (Beadell *v.* Eastern Counties R. Co., 2 C. B. N. S. 509.) It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company, as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery.

It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company, which is generally paid by others for the same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates deter-

mined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor.

As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. "Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage." (Wordin *v.* Bemis, 32 Conn. 268.)

The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less $19.55, the amount paid, to wit, the sum of $171.55, and for damages in the nature of demurrage, for a detention for six days, being $114.66.

The claimants appealed.

Simeon E. Baldwin and *William K. Townsend*, for the libellants.

Johnson T. Platt, for the claimants.

Blatchford, J. The decision of this case in the District Court was placed upon the ground that the New Haven and Northampton Company, as a common carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place it there, shovellers designated by the company, and pay such shovellers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the District Court ignored the status of the company as a wharf owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, etc., is the use of the wharf; that all which the company did was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shovelled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptation of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven," — the Glasgow Company being a mill owner at a place on the line of the railroad company, and

the latter company being the owner of the Canal Dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks, — the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on, the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovellers, in any relation between the company as a wharf owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the District Judge, in his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable, it would have been reasonable. It might, indeed, have been reasonable without being necessary. But, to be reasonable, it mus be reasonable as respects both parties. In the present case, the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal, for shovelling into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

HAYS *v.* THE PENNSYLVANIA COMPANY.

CIRCUIT COURT OF THE UNITED STATES, N. OHIO, 1882.

[12 *Fed.* 309.]

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year, — the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defend-

ant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight

carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of Nicholson *v.* G. W. R. Co., 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the railroad of

£10,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully loaded trains, at the rate of seven trains per week. It was in consideration of these obligations — which, in the judgment of the court, enabled the railroad company to perform the service at less expense — the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents;

or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

MENACHO *v.* WARD.

CIRCUIT COURT OF THE UNITED STATES, S. NEW YORK, 1886.

[27 *Fed.* 529.]

WALLACE, J. The complainants have filed a bill in each of these causes to restrain the defendants from making discriminations for transportation against the complainants, which consist in charging them a higher rate of freight than is charged by defendants to other shippers of merchandise generally. A motion is now made for a preliminary injunction. The facts in each case are essentially the same, and both cases may be considered together.

The complainants are merchants domiciled in the city of New York, and engaged in commerce between that port and the island of Cuba. The defendants are proprietors or managers of steamship lines plying between New York and Cuba. Formerly the business of transportation between the two places was carried on by sailing vessels. In 1877 the line of steamships known as "Ward's Line" was established, and in 1881 was incorporated by the name of the New York & Cuba Mail Steamship Line under the general laws of the State of New York. At

the time of the incorporation of this company the line of steamships owned by the defendants Alexandre & Sons had also been established. These two lines were competitors between New York and Cuba, but for several years both lines have been operated under a traffic agreement between themselves, by which uniform rates are charged by each to the public for transportation. The two lines are the only lines engaged in the business of regular transportation between New York and Cuba; and unless merchants choose to avail themselves of the facilities offered by them, they are obliged to ship their merchandise by vessels or steamers which may casually ply between the two places.

It is alleged by the complainant that the defendants have announced generally to New York merchants engaged in Cuban trade that they must not patronize steamships which offer for a single voyage, and on various occasions when other steamships have attempted to procure cargoes from New York to Havana have notified shippers that those employing such steamships would thereafter be subjected to onerous discriminations by the defendants. The defendants allege in their answer to the bill, in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havana, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be "placed upon the black-list" if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants. The freight charges, by the course of business, are paid by consignees at the Cuban ports. The complainants have attempted to pay the freight in advance, but have found this course impracticable because their consignees are precluded from deducting damages or deficiencies upon the arrival of the goods from the charges for freight, and as a result some of the complainants' correspondents in Cuba refuse to continue business relations with them, being unwilling to submit to the annoyance of readjusting overcharges with complainants. Upon this state of facts the complainants have founded the allegation of their bill that the defendants "have arbitrarily refused them equal terms, facilities, and accommodations to those granted and allowed by the defendants to other shippers, and have arbitrarily exacted from them a much greater rate of freight than the defendants have at the same time charged to shippers of merchandise generally as a condition of receiving and transporting merchandise." They apply for an injunction upon the theory that their grievances cannot be redressed by an action at law.

It is contended for the complainants that a common carrier owes an

equal duty to every member of the community, and is not permitted to make unequal preferences in favor of one person, or class of persons, as against another person or class. The defendants insist that it is permitted to common carriers to make reasonable discriminations in the rates demanded from the public; that they are not required to carry for all at the same rates; that discriminations are reasonable which are based upon the quantity of goods sent by different shippers; and that the discrimination in the present case is essentially such a discrimination, and has no element of personal preference, and is necessary for the protection of the defendants.

Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. Baxendale *v.* Eastern Counties R. Co., 4 C. B. (N. S.) 78; Branley *v.* Southeastern R. Co., 12 C. B. (N. S.) 74; Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Boston & L. R. Corp., 115 Mass. 416, 422.[1]

In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The defendants assume to justify upon the theory that a carrier may regulate his charges upon the basis of the quantity of goods delivered to him for transportation by different shippers, and that their discrimination against the plaintiff is in substance one made with reference to

[1] The court here cited passages from the opinions in Messenger *v.* Pennsylvania R. R., 37 N. J. L. 531, and McDuffee *v.* Portland & R R. R., 52 N. H. 430. — Ed.

the quantity of merchandise furnished by them for carriage. Courts of law have always recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried for the shipper, either at a given shipment, or during a given period of time, although public sentiment in many communities has objected to such discriminations, and crystallized into legislative condemnation of the practice. By the English statutes (17 & 18 Vict. c. 31) railway and canal carriers are prohibited from "giving any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, in any respect whatever," in the receiving, forwarding, and delivery of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight. Ransome *v.* Eastern C. R. Co., 1 Nev. & McN. 63, 155; Nicholson *v.* Great Western Ry. Co., Id. 121; Strick *v.* Swansea Canal Co., 16 C. B. (N. S.) 245; Greenop *v.* S. E. R. Co., 2 Nev. & McN. 319.

These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in determining what charges are reasonable. He may be able to carry a large quantity of goods, under some circumstances, at no greater expense than would be required to carry a smaller quantity. His fair compensation for carrying the smaller quantity might not be correctly measured by the rate per pound, per bushel, or per mile charged for the larger. If he is assured of regular shipments at given times, he may be able to make more economical arrangements for transportation. By extending special inducements to the public for patronage he may be able to increase his business, without a corresponding increase of capital or expense in transacting it, and thus derive a larger profit. He is therefore justified in making discriminations by a scale of rates having reference to a standard of fair remuneration of all who patronize him. But it is impossible to maintain that any analogy exists between a discrimination based upon the quantity of business furnished by different classes of shippers, and one which altogether ignores this consideration, and has no relation to the profits or compensation which the carrier ought to derive for a given quantum of service.

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for

the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

A common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself." Nelson, J., in New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344. His obligations and liabilities are not dependent upon contract, though they may be modified and limited by contract. They are imposed by the law, from the public nature of his employment. Hannibal R. R. *v.* Swift, 12 Wall. 262. As their business is "affected with a public interest," it is subject to legislative regulation. "In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." Waite, C. J., in Munn *v.* Illinois, 94 U. S. 113, 134. It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation. Illustrations are found in the cases of State *v.* Hartford & N. H. R. Co., 29 Conn. 538; Hooker *v.* Vandewater, 4 Denio, 349; W. U. Tel. Co. *v.* Chicago & P. R. Co., 86 Ill. 246; Coe *v.* Louisville & N. R. Co., 3 Fed. Rep. 775.

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of

charges paid to obtain the delivery of goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, "as practical and efficient to the ends of justice" as the remedy in equity. Watson *v.* Sutherland, 5 Wall. 74.

The motion for an injunction is granted.

ROOT *v.* LONG ISLAND RAILROAD.

COURT OF APPEALS OF NEW YORK, SECOND DIVISION, 1889.

[114 *N. Y.* 300; 21 *N. E.* 403.]

HAIGHT, J. In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defendant agreed with Quintard to transport in its cars all the coal in car-loads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water-Works Company, with which company the defendant reserved the right to make a special rate, which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of 10 years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of $2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal pocket were constructed at an expense of $17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of 15 cents per ton upon the coal so shipped that this action was brought. The defence is that the contract was against public policy, and was therefore illegal and void.

The defendant is a railroad corporation organized under the laws of the State, and was therefore a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different States of the Union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination

to individuals; that its charges must be reasonable. Railroad Co. v. People, 67 Ill. 11; Vincent v. Railroad Co., 49 Ill. 33. In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. Scofield v. Railway Co., 43 Ohio St. 571. In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void, as creating an illegal preference; that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation, of goods. Messenger v. Railroad Co., 36 N. J. Law, 407; State v. Railroad Co., 48 N. J. Law, 55. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to who and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations. McDuffee v. Railroad, 52 N. H. 430. To similar effect are cases in other States. Express Co. v. Railroad Co., 57 Me. 188; Shipper v. Railroad Co., 47 Pa. St. 338; Railroad Co. v. Gage, 12 Gray, 393; Menacho v. Ward, 27 Fed. Rep. 529. In New York the authorities are exceedingly meagre. The question was considered to some extent in the case of Killmer v. Railroad Co., 100 N. Y. 395, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded 10 per cent of the capital actually expended, did not relieve the company from its common law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others.

Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court. Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of $17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

LOUGH *v.* OUTERBRIDGE.

COURT OF APPEALS OF NEW YORK, 1894.

[143 *N. Y.* 271; 38 *N. E.* 292.]

O'BRIEN, J. The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now, with respect to the facts upon which it arises. In order to present the question clearly, a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant, the Quebec Steamship Company, is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly 20 years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer El Callao, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passengers and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay

in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the El Callao, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained; but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the El Callao was in the port of New York taking on cargo, as was also the defendants' steamer Trinidad. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about 1,760 dry barrels of freight at the rate of 25 cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the Trinidad, to sail on June 4th, at 25 cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the Trinidad. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the El Callao was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand last mentioned had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the 1,760 barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of 25 cents; but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their

freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive. This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (Watson *v.* Sutherland, 5 Wall. 74; Menacho *v.* Ward, 27 Fed. 529; Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 741; Coe & Milsom *v.* Railroad Co., 3 Fed. 775; Vincent *v.* Railroad Co., 49 Ill. 33; Scofield *v.* Railroad Co., 43 Ohio St. 571), though I am not aware of any in this State that would bring a case based upon such facts within the usual or ordinary jurisdiction of equity. So far as this case is concerned, it is sufficient to observe that it is now settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defence that an adequate remedy at law exists, unless he pleads that defence in his answer. Cogswell *v.* Railroad Co., 105 N. Y. 319; Town of Mentz *v.* Cook, 108 N. Y. 504; Ostrander *v.* Weber, 114 N. Y. 95; Dudley *v.* Congregation, 138 N. Y. 460; Truscott *v.* King, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not now stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits. The defendants were engaged in a business in which the

public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. Munn *v.* Illinois, 94 U. S. 113; People *v.* Budd, 117 N. Y. 1. In England these duties are, to a great extent, regulated by the railway and canal traffic act (17 & 18 Vict., c. 31), and by statute in some of the States, and in this country, so far as they enter into the business of interstate commerce, by act of Congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this State that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently; and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. 2 Kent, Comm. (13th ed.) 598; Story, Bailm. §§ 495, 508; 2 Pars. Cont. 175; Killmer *v.* Railroad Co , 100 N. Y. 395; Root *v.* Railroad Co. 114 N. Y. 300. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question, into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal and other property to a given place for less compensation per ton than he could carry 50; and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the

carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the State, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries. Railroad Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Railroad Co., 115 Mass. 422; Steamship Co. *v.* McGregor, 21 Q. B. Div. 544, affirmed 23 Q. B. Div. 598, and by H. L. 17 App. Cas. 25; Evershed *v.* Railway Co., 3 Q. B. Div. 135; Baxendale *v.* Railroad Co., 4 C. B. (N. S.) 78; Branley *v.* Railroad Co., 12 C. B. (N. S.) 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But, as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the Supreme Court of Massachusetts in the case of Railroad Co. *v.* Gage, *supra*. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done.

If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage." In Evershed *v.* Railway Co., *supra*, Lord Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of Menacho *v.* Ward, 27 Fed. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge Wallace: "Unquestionably, a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of

goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasonable, is seldom, if ever, material. Phelps *v.* Nowlen, 72 N. Y. 39; Kiff *v.* Youmans, 86 N. Y. 324. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the El Callao proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of Steamship Co. *v.* McGregor, *supra*, are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a

right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders." The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

FINCH, GRAY, and BARTLETT, JJ., concur. PECKHAM, J., dissents. ANDREWS, C. J., not sitting.

Judgment affirmed.

DITTMAR *v.* NEW BRAUNFELS.

COURT OF CIVIL APPEALS, TEXAS, 1899.

[20 *Texas Civil Appeals*, 293.]

FISHER, C. J. Appellant, Dittmar, brought this suit, in the nature of an injunction, to restrain the city of New Braunfels from interfering with his use of water from the water system of New Braunfels for domestic purposes, and to require the city to restore him to his rights as a consumer of water under a contract existing between him and the city, and to connect his residence with the water mains of the city, after the city authorities operating the waterworks, without his consent, had disconnected his residence from the water system, and cut off his supply of water. There is also a claim of damages claimed to have resulted by reason of the wrongful interference of the city with his rights in the use of water. A temporary injunction was granted, but, upon final hearing, general and special demurrers were addressed to the petition, which were sustained, and the case dismissed, from which judgment the appellant has appealed.

Without stating in full the language of plaintiff's petition, the cause of action, as there set out, is substantially as follows: The city of New Braunfels is incorporated under the general laws of this State, and plaintiff is a resident and taxpayer thereof, occupying, with his family, a residence within the limits of the city. The city has in operation, and has had for several years past, a permanent and adequate system of waterworks, which is carried on and conducted by the city for the purpose of supplying the inhabitants water for public and private use. There is an abundant supply of pure and wholesome water, which the city, by the exercise of reasonable diligence in the operation of its waterworks, can continuously furnish the plaintiff and the other inhabitants of the city. This water is used for fire protection and for domestic purposes by the inhabitants, and there is not, within the city, any other source from which the inhabitants can obtain a sufficient and wholesome supply of water. In November, 1895, the appellant entered into a contract with the city, whereby it agreed to furnish him water at his residence, for household purposes, at the rate of one dollar a month, payable quarterly in advance. In pursuance of that contract, at considerable expense to the plaintiff, the amount of which is set out in the petition, the plaintiff's residence was connected with the water system operated by the city, and he, from that time, had promptly paid the water rates due from him, and has complied with all reasonable regulations made by the city for the consumption and use of water; and if any water rent, upon the trial of the case, was found to be due, he was ready and willing to pay the same, and had tendered to the defendant all amounts due it for the use of water. In pursuance of said contract, he continued to use the water for household purposes, at his residence, until May, 1898,

when the defendant, through its servants operating the water system, wrongfully, without his consent, cut off the supply of water from his residence; and thereupon he demanded of the defendant that he be again connected with the water system, and restored to his rights as a consumer, and tendered to the defendant the sum of $12, all of which the defendant refused to do. In 1897 the city passed an ordinance requiring consumers of water for household purposes to enter into a contract, which is styled in the petition as "Exhibit A," as follows: "$12.00. (Ord. Sec. 26.) New Braunfels, Texas, 1897. The city of New Braunfels is requested to connect my property known and described as lots Nos. 9 and 10, on Academy Street, Jahn's addition, in ward No. 4, New Braunfels, Texas, with the waterworks system of said city. The water is wanted and applied and subscribed for under conditions, and for the purposes and uses, following: Household. It is especially agreed and understood, and made a part of the consideration of this contract, that the city of New Braunfels is in no manner to be held liable for any scarcity or failure of water, nor for the quality or quantity thereof, nor for any failure to supply water in the event of fire on the premises, or other casualty or happening. This order is given and signed freely, with the understanding and acquiescence of the terms and conditions above, and with the knowledge and the understanding that, if a contract is desired not containing such a waiver, a higher rate would be demanded by the city, and with the full knowledge and acquiescence of the ordinance of the said city exempting it from liability in the event of failure or scarcity of water, either for fire or domestic purposes. This contract is continuous, and the subscriber is aware of the condition that, should he desire to have the same altered, abated, or cancelled, notice must be given to the city of New Braunfels at least thirty days beforehand; otherwise this contract is to remain in full force. But nothing herein shall be construed to prevent the city from cutting off the supply without notice or liability for damage of any kind, in the event the rate herein called for and specified is not promptly paid when due."

And at the same time the city passed the following ordinances, which are known as sections 27 and 29:

"Section 27. Any person, corporation, or firm desiring a contract or form differing in its conditions from the order given in section 26 hereof, may, by application in writing to the city council of New Braunfels, Texas, have a special contract granted him (or it) at the rate to be fixed by such council, upon the granting of such application, which rate shall not be less than double the amount of the charges in the ordinances set out, except for good reasons to the contrary, shown to the city council."

"Section 29. No connections shall be made nor shall any water be furnished or supplied, unless the owner of the property to be so connected or supplied make his application therefor in writing and form following, to wit: [Here follows the form Exhibit A, leaving

blank the name, lot, street, &c., so as to constitute a printed blank form.]"

This ordinance, as stated in section 27, was intended to give those inhabitants the right to a supply of water who refused to sign and enter into the contract set out in Exhibit A. The plaintiff refused to sign the contract as previously set out, or any of the contracts required by the ordinance as stated in section 27, and for this reason, solely, the city disconnected him from the water system, and refused further to continue furnishing him a supply of water under the contract that he had previously entered into with the city in 1895. It is also averred that it cost the city no more to furnish plaintiff a supply of water for household purposes than it does other inhabitants of the city; that it is furnishing other inhabitants for household purposes a supply of water at the same rate that it agreed to furnish the plaintiff under the contract of 1895. In other words, that there are no dissimilar conditions existing between the plaintiff and the other inhabitants with reference to the cost and expense of furnishing water, and that the city is continuing to furnish other inhabitants an adequate and wholesome supply of water for household purposes at the rate of one dollar per month. The contention of the appellant is that the contract as stated in Exhibit A, and the ordinance upon which it is based, are unreasonable, and therefore void, and that for his refusal to enter into a contract of that nature the city arbitrarily, and without legal reason, cut off his supply of water and disconnected him from the system; that his rights as a consumer were fixed under the contract that he had entered into in 1895, which could not be disturbed, except for reasonable rules and regulations, which it is not questioned the city had the right to make, regarding the use and consumption of water. This court has previously held in the case of Lenzen *v.* City of New Braunfels, which will be found reported in 35 S. W. 341, that a city who by contract owes a duty to a consumer will be required to exercise ordinary care in furnishing and supplying him with the use of water. And the averments of the petition, in terms, state that the purpose of passing the ordinances which are here assailed was to evade the decision of this court in the Lenzen Case; and the averments of the petition, together with the terms of the contract as set out in Exhibit A, impress us with the belief that such was, in part, the purpose of the council of the city in passing the ordinances, and requiring consumers to enter into contracts of the character set out in the exhibit.

A city has the power to require consumers to enter into contracts obligating them to comply with the reasonable rules and regulations which may be imposed for the operation and protection of the water system and for the use of the water; but, as a prerequisite to furnishing a consumer a supply of water, the city has no power to require him to enter into an agreement absolving the city from the duties imposed upon it by the law and release it from liability for its own negli-

gence. The contract in question, which the plaintiff was required to sign, releases the city from liability for any scarcity or failure of supply of water, or for the quality thereof, or for any failure to supply water in the event of a fire or other casualty or happening, and it expressly exempts it from liability for failure or scarcity of water for fire or domestic purposes. It is averred in the petition that the sources from which the city obtained its water will furnish an unlimited supply of a wholesome quality, if the city should conduct its works with due care with reference to its obligation to the consumers. This contract, in terms, releases the city from its obligation to furnish water of good quality and sufficient quantity, and for a failure to supply water in the event of a fire on the premises or other casualty or happening. In other words, the purpose of these stipulations in this contract seems to be that, for any failure or refusal to furnish water to a consumer, either with reference to its quality or quantity, the city should be released from liability. We are clearly of the opinion, in view of the duty that the city owes to its consumers of water, that the imposition of a contract of this nature would be unreasonable, and therefore void. It is probably true, if a consumer had entered into a contract of this nature and the city had undertaken under it to supply him with water, but had violated its duty and obligations resting upon it to furnish him an adequate and wholesome supply of water when it had in its power to do so, that the consumer could have, nevertheless, held it liable for the damages he had sustained; for, although the consumer may have agreed to release the city, still, in urging his rights in an action against it, a court would not have enforced those provisions of the contract which were unreasonable, in that they released the city from its own negligence. While it is true that no obligation would have been created against a consumer by reason of such unreasonable terms in a contract of this nature, still the city has no right to require him to sign and execute a contract of this character as a prequisite to his right to the use and consumption of water, and, upon failure to comply with this unreasonable request, to cut off the supply which he was entitled to by reason of his previous contract.

It is next contended that as the ordinance upon which this contract is based, together with a contract of this nature, are void as being unreasonable, the city could not require him, as a condition for the use of water, to enter into a contract of a nature called for by section 27 of the ordinances. We clearly think the plaintiff is also correct in this contention. It is averred in the petition that the other inhabitants of the city are enjoying the privilege of the use of water under a similar rate as that given to the plaintiff in the contract of 1895, and that the situation and condition of these people is similar to that of the plaintiff. Upon the refusal of the plaintiff to sign the contract, as stated in Exhibit A, the city had no authority, under the averments of the petition, to require him to enter into a contract such as is required in section 27 of the ordinances; for a contract as required by that ordinance

would place a greater burden upon the plaintiff, in requiring him to pay a greater price for the consumption of water for the same purpose than that for which it was furnished the other inhabitants of the city. A city has the power and right to prescribe reasonable charges for the use of water it furnishes to consumers, but it has no power to discriminate between the inhabitants of the city in its charges for the use of water, when they occupy a similar situation.

Reversed and remanded.

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE & OHIO RAILROAD.

SUPREME COURT OF THE UNITED STATES, 1892.

[145 *U. S.* 263.]

THIS proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons travelling together on one ticket will be transported over said lines of road between stations located thereon at two cents per mile *per capita*, which is less than the rate for a single person; said rate for a single person being about three cents per mile."[1] . . .

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets, within the meaning of section 22 of the act to regulate commerce,[2] and that, when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from

[1] Part of the statement of facts is omitted. — ED.

[2] Act of Feb. 4, 1887; 24 St. 379.

charging rates for the transportation over its lines of a number of persons travelling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. . . .

Mr. Justice BROWN delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 St. 379), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; Fitchburg Railroad Co. *v.* Gage, 12 Gray, 393; Baxendale *v.* Eastern Counties Railway Co., 4 C. B. (N. S.) 63; Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson *v.* Pensacola Railway Co., 16 Fla. 623; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the States acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several States. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater

compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute, — only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neigh-

boring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle, beyond all doubt, that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, — in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, — it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously

within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, — trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveller, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveller, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists travelling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita*, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public, generally, a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete

monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously towards any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago, & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition

of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Hozier *v.* Caledonian Railroad Co., 17 Sess. Cas. (D) 302, 1 Nev. & McN. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So in Jones *v.* Eastern Counties Railway Co., 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in Ransome *v.* Eastern Counties Railway Co., 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than it charged Peterboro merchants, who had made arrangements with it to carry large quantities over its lines, and that the sums charged the Peterboro merchants were

fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade *v.* Northeastern Railway Co., 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald *v.* Hovey, 110 U. S. 619.

There is nothing in the objection that party rate tickets afford facilities for speculation, and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of 10 or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore

Affirmed.

STATE *v.* CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILWAY CO.

SUPREME COURT OF OHIO, 1890.

[47 *Ohio St.* 130.[1]]

BRADBURY, J. . . . The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and, finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank-cars, a lower rate of freight per 100 pounds than they charged for shipping the same in barrels, in carload lots. The defendants, by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with any one to establish a monopoly. The actions were referred to a referee, to take the evidence, and to report to this court his findings of fact and conclusions of law therefrom, — all which has been done; and the cases are before us upon this report. . . .

That the Cincinnati, Washington & Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans & Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers, and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shipper, or with any purpose to inflict injury on their competitors, but in order that the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of

[1] This case is abridged. — ED.

others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles, and a thorough collation of the authorities, bearing upon the duties of railroad companies towards their customers, is to be found in the opinion of Judge Atherton, in the case of Scofield *v.* Railway Co., 43 Ohio St. 571, to which nothing need be now added.

It appears that, of the two methods of shipping oil, — that by the barrel, in carload lots, and that in tank-cars, — the first only was available to George Rice, and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank-cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank-cars, and that the rate per barrel in tank-cars was very much lower than in barrel packages, in box-cars; that in fact the Cincinnati, Washington & Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore & Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one-half the open rates it charged the Marietta refiners, and that both railroad companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank-cars used by them. It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. A railroad is an improved highway. The public are equally entitled to its use. It must provide equal accommodation for all, upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the interstate commerce commission in the report of the case of Rice *v.* Railroad Co. "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight, when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. *v.* Pratt, 22 Wall. 123) and then to offer their use to everybody, impartially." 1 Int. St. Com. R. 547. No doubt, a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier

provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practised at the will of the railroad company, and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels, in box-cars, in carload lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty, it could not, in justice, avail itself of its own neglect as a ground of discrimination. It must either provide tank-cars for all of its customers alike, or give such rates of freight in barrel packages, by the carload, as will place its customers using that method on an equal footing with its customers adopting the other method. *Judgment ousting* defendants from the right to make or charge a rate of freight per 100 pounds for transporting oil in iron tank-cars, substantially lower than for transporting it in barrels, in carload lots.[1]

[1] *Compare:* Arkansas R. R. *v.* Smith, 53 Ark. 275; Cowden *v.* S. S. Co., 94 Cal. 470; Johnson *v.* R. R., 16 Fla. 623; Louisville R. R. *v.* Wilson, 132 Ind. 517; Chicago R. R. *v.* P., 67 Ill. 11; Cook *v.* Chicago R. R., 81 Ia. 551; Sloan *v.* R. R., 61 Mo. 21; Ragan *v.* Arken, 77 Tenn. 609. — Ed.

GRIFFIN *v.* GOLDSBORO WATER CO.

SUPREME COURT OF NORTH CAROLINA, 1898.

[112 *N. C.* 206.]

CIVIL action for an injunction, pending in Wayne Superior Court and heard before TIMBERLAKE, J., at Chambers on 19th April, 1898, on a motion to dissolve a restraining order thereto issued. His Honor continued the injunction to the hearing and defendant appealed.

CLARK, J. The defendant corporation is the owner of a plant which supplies water to Goldsboro and its inhabitants under a franchise granted by the city. It has no competition. The complaint alleges that to prevent competition the defendant reduced its rates largely to certain parties who threatened to establish a rival company, but not only did not make a corresponding reduction to the plaintiffs and other customers but proposes to put in meters whereby the rates to plaintiffs and others will be greatly increased, and threatens to cut off the water supply of the plaintiffs if they do not pay the increased rates, which will be to their great injury; that the rates charged by the corporation are not uniform and those charged the plaintiffs are unjust and unreasonable. The defendant denies, as a matter of fact, that the rates charged the plaintiffs are unreasonable and contends, as a proposition of law, that the company's rates are not required to be uniform and that it can discriminate in the rates it shall charge. It also relies upon the schedule of rates contained in the contract with the city and avers that the charges to the plaintiffs do not exceed the rates therein permitted.

The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is "affected with a public use." In Munn *v.* Illinois, 94 U. S. 113, which was a case in regard to regulating the charges of grain elevators, it was held that, in England from time immemorial and in this country from its first colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and, where the owners of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must to the extent of that interest submit to be controlled by the public.

Probably the most familiar instances with us are the public mills whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a State Commission, established by law. There have been reiterated decisions in the United States Supreme Court and in the several States

affirming the doctrine laid down in Munn *v.* Illinois, *supra*, and as to every class of interest affected with a public use, among others, water companies. Spring Valley *v.* Schottler, 110 U. S. 347. The right of fixing rates is a legislative function which the courts cannot exercise, but it is competent for the courts, certainly in the absence of legislative regulations, to protect the public against the exaction of oppressive and unreasonable charges and discrimination. "The franchise of laying pipes through the city streets and selling water to the inhabitants being in the nature of a public use, or a natural monopoly, the company cannot act capriciously or oppressively, but must supply water to all impartially and at reasonable rates, and an injunction will issue to prevent the cutting off the water supply where the customer offers to pay a reasonable rate and the company demands an unreasonable one." 2 Beach Pri. Corp., Section 834 (c); Munn *v.* Illinois, *supra;* Lumbard *v.* Stearns, 4 Cush. 60. In the 29 A. & E. Enc. 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates." If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like could charge any rates however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one and make alive that of another and instead of being a public agency created to promote the public comfort and welfare these corporations would be the masters of the cities they were established to serve. A few wealthy men might combine and, by threatening to establish competition, procure very low rates which the company might recoup by raising the price to others not financially able to resist — the very class which most needs the protection of the law — and that very condition is averred in this complaint. The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none, and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other.

While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Since the Constitution of 1868, Article VIII, Section 1, if the rates had been prescribed in a charter granted by the Legislature, they would be subject to revocation, and indeed independently of that constitutional

provision, Stone *v.* Farmer's Co., 116 U. S. 307; R. Co. *v.* Miller, 132 U. S. 75; Chicago *v.* Munn, 134 U. S. 418; Georgia *v.* Smith, 70 Ga. 694; Winchester *v.* Croxton, 98 Ky. 739, still less can these rates bind consumers (if unreasonable or discriminating) since the town had authority to grant the franchise but not to stipulate for rates binding upon the citizens. The Legislature did not confer that power. The rates are binding upon the company as a maximum simply because acting for itself it had the power to accept the franchise upon those conditions.

The allegations of fact that the rates are unreasonable and oppressive are denied. That they are not uniform is not denied and the defendant contended that it had the right to discriminate, which cannot be sustained. On the final hearing the cost and value of the property will be material in determining as to the reasonableness of the rates charged. Smyth *v.* Ames (known as the "Nebraska Case"), U. S. Supreme Court, 1898. The evidence offered on that point on the hearing below is not satisfactory, the mere amount of mortgage bonds issued on the property being no reliable guide to the courts as to the true value of the investment. It may be, as sometimes happens, that the bonds and stocks are watered. Nor is the evidence of the cost of construction and operation conclusive, as has often been held, for it may be that the work was extravagantly constructed or is operated under inefficient management and the public are not called on to pay interest upon such expenditures, in the shape of unreasonable or extortionate rates. Missouri *v.* Smith, 60 Ark. 221; Chicago *v.* Wellman, 143 U. S. 339; Livingstone *v.* Sanford, 164 U. S. 578.

The court below properly continued the cause to the hearing.

No error.

COMMONWEALTH *v.* THE DELAWARE AND HUDSON CANAL CO. AND PENNSYLVANIA COAL CO.

SUPREME COURT OF PENNSYLVANIA, 1862.

[43 *Pa. St.* 295.][1]

THE agreement referred to in the information, after reciting amongst other things, in substance and effect, that it was not for the interest of the canal company that the surplus capacity of its canal for transportation should remain unemployed; that no company would prudently undertake to construct a "railway connecting with it without a certainty of being allowed to transport thereon at a permanent rate of tolls; that with a view to induce capitalists to invest their funds in the construction of a railroad to be connected with the canal, the company had offered a permanent tariff of tolls on all coal entering the canal on any such railroad; provides that the canal company will at all times

[1] This case is abridged. — ED.

hereafter furnish to any and all boats owned or used by the Wyoming Coal Association for the time being, or its assigns, for the purpose of transporting coal entering the canal by railroads connecting with the canal, &c., &c., all the facilities of navigation and transportation which the canal shall afford, when in good and navigable condition and repair, to boats owned or used by any other company or persons, or belonging to or used by or containing coal transported for the canal company, charging and collecting a toll on the coal at a rate per ton to be established in the manner following, viz.: On the 1st day of May in each and every calendar year the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold to be delivered at Rondout, and to arrive by the said canal during the said calendar year, shall be ascertained, and the average price at which such sales have been contracted, shall also be ascertained, and from the average price thus ascertained, $2.50 shall be subtracted, and one-half of the remainder shall be the toll per ton during such calendar year, except that if any discount or deduction, contingent or otherwise, shall be agreed upon or contemplated in the contracts for such sales, the said toll shall be reduced correspondingly to such discount or deduction as shall be actually made. But provided, nevertheless, that if on the 1st day of May, in any calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold as aforesaid, shall be less than one-half the estimated sales for such year, the toll during such year shall be calculated in the manner hereinbefore provided on the average price at which the sales of lump coal for such year shall be actually made; and if in any calendar year no sales of the coal of the Delaware and Hudson Canal Company shall be made, then and in that case the toll during such year shall be calculated on the sales for such year of the lump coal of the Wyoming Coal Association for the time being, or its assigns, in the manner hereinbefore provided for, calculating the toll on the sales of the said Delaware and Hudson Canal Company. And in case of an enlargement of the said canal, the said president, managers, and company, and their successors and assigns, may also charge and collect an additional toll on the coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of the said enlargement, in the manner following, viz.: The cost of transportation per ton on the said canal, between the points at which such coal shall enter the said canal and the point on the Rondout creek, at which the said canal meets tidewater, after the full effect of all the improvements previous to the said enlargement shall have been experienced, shall be fairly ascertained or established; the cost of transportation per ton on the said canal between those points after the said enlargement shall have been completed shall also be fairly ascertained or estimated, and one-half of such portion of the reduction in the cost of transportation per ton on the said canal between these points as shall be estimated to have

been produced by the said enlargement, and by no other cause, shall be the additional toll per ton to be thereafter permanently charged."

The contract then provides that until such enlargement the canal company shall not be bound to allow over 400,000 tons to be transported over the canal in any one season, and that after such enlargement it shall not be bound to allow such quantity to be increased so as to exceed in any one season "one-half of the whole capacity for transportation of the said canal, exclusive of the tonnage employed in the transportation of articles other than coal," and the main question was, whether this agreement, made on the 31st day of August, 1847, between the canal company and the Wyoming Coal Association, and renewed with the Pennsylvania Coal Company, was in excess of the legitimate power of said parties.

The defendants were not agreed as to the validity of the contract, the Hudson Canal Company insisting that it was and is contrary to law, while the coal company claimed that it is a valid and binding agreement as between the parties. Separate answers to the information were filed by the defendants, but as the objections to the agreement are all contained in the answers of the canal company, and are sufficiently stated in the opinion of this court, it is unnecessary to repeat them here.

Lowrie, C. J. . . The information alleges that the agreement in controversy is in excess of the legitimate power of these corporations, and prays that it may be so declared by this court, and that the defendant may be enjoined from acting under it, and also that they may be required to appear and consent to or refuse its cancellation, and for such other decree as may be agreeable to equity. The information would have been formally and substantially improved if it had specially suggested wherein the agreement is in violation of the corporate rights of the defendants. But we may treat this defect as supplied by the answers of the defendants.

The defendants have got into a quarrel among themselves about the agreement, and the canal company confesses and claims that the agreement is contrary to law, while the coal company insists that it is not, and claims that it shall stand as the bond and law of the relations between the parties. It is therefore in the answer of the canal company that we find the objections to the contract specified, and we proceed to consider them.

1. It is objected that the agreement grants to the coal company a monopoly of the one-half of the capacity of the canal of the other party, to the exclusion of the public, because it contracts to furnish to the coal company all the facilities of navigation which the canal will afford, not exceeding one-half of its whole capacity, inclusive of the tonnage employed in the transportation of articles other than coal.

This leaves to all property other than coal its full right of transportation on the canal; but it does profess to give the coal company a right, as against other carriers of coal, to a preference to the extent of

one-half the capacity of the canal. And this may be wrong if it interferes with the claims of others to have their coal carried as cheaply and speedily as that of the coal company. But there is no complaint that anybody has been wronged by this, or that either company has by this actually exercised any function that is exclusive of the public right. When the defendants do in fact transgress the limits of their legitimate functions and interfere with the public rights, then will be the time to bring a charge against them. A mere intention or contract to allow an act that may be wrong, is no ground for an information in law or equity in the nature of the *quo warranto*.

2. It is objected that the agreement, instead of fixed tolls to be collected at the locks according to the charter of the canal company, provides for a rate of toll to be ascertained by the market price of coal in every year, and thus the rate of toll remains uncertain until this price is ascertained, and it cannot therefore be demanded at the locks, and may, in certain states of the coal market, exceed the toll allowed by the charter.

We do not see that this objection involves any public grievance. The canal company has a right to commute its tolls; and we cannot see that the public has any interest in objecting that it may get too much, under the contract of commutation, in a certain contingency, or that it has contracted away part of its means of obtaining the little that it agrees to accept under the contract. At all events, the agreement is, by itself, no actual transgression of proper functions.

3. But the above objection is repeated on behalf of the public; that, on account of the uncertainty of the toll, the canal company cannot always know how much to demand of others, and therefore cannot do equal justice to all according to its public duty as a canal company. 12 Harris, 138; 10 M. & W. 398.

But we find no averment or pretence that the public or any private person has suffered any wrong by reason of this, or that the canal company has been compelled, in obeying this part of the contract, to exercise any functions that do not properly belong to it as a canal company. If it really means to be honest towards the public, we doubt not that it will be able to discover some such reasonable rule of equality in dealing with other carriers that the public will have no reasonable ground of complaint. Exact equality is not demanded, but such a reasonable approximation to it as can be secured by reasonable general rules, free from mere arbitrariness.

4. It is objected that because the tolls are fixed at half the proceeds of the coal after deducting the estimated costs of the production, therefore the canal company is a speculative dealer in coal, which is a departure from the purposes of its creation.

We do not perceive that the conclusion follows from the premises. Measuring toll by the profits on the article when sold, is not becoming a dealer in coal, else government would be a dealer in articles that are subjected to an *ad valorem* tariff. It is very common for the State to

measure taxes according to supposed profits, and we find no public wrong in the canal company doing so in its contract of commutation of tolls.

5. It is objected that such a contract, to be valid, ought to have the sanction of the Legislature, because it affects the interest and income of the State.

But it is not any way shown to us that it does so. Nothing like this is averred in the information, and of course we cannot assume it. If either of these corporations *do* anything under the contract to the interest and income of the State, and contrary to its charter, and this be shown to us in any regular manner, we shall probably interfere and correct it. But we can do nothing arbitrarily. We must have some definite allegation and proof of usurpation before we can do anything. The allegation of mere probabilities of wrong raises no question for our interference.

6. It is objected that, since, under the contract, the tolls are measured by the profits, the coal company has the power by sacrificing the regular profits or a portion of them, to control the coal market, and may at its pleasure so depress the price as to ruin many of those engaged in the trade, and greatly disturb the public interest without any serious injury to itself, and that it did so last spring.

If this had been averred in the information, and proved as one of the grounds of the complaint against the agreement, we should have regarded it as the most serious one of all those that have been urged; but it is neither alleged nor proved by the Commonwealth. And we incline to think that it is properly so, for it seems to us that this objection is founded rather on the abuse of the agreement than on the nature of it, and that the remedy ought to be compensation under the equity, if not the letter, of the agreement, rather than cancellation of it.

Nothing can be more obvious than that the parties intended to adopt a standard by which the tolls were to be indirectly measured. But that can be no standard that may be controlled entirely by the will of either party, and neither can be supposed to have intended such a measure of value. They both meant to fix a standard independent of themselves, and in the public market where we look for the natural standard of value. Both of them, as dealers in the market, would have an influence in fixing the market price, and therefore the standard: but neither of them, dealing according to the fair laws of the trade and of competition in it, could control this standard or would attempt to do it. That is a standard that may well be appealed to, because it is never merely arbitrary, and in trade and in law it is constantly appealed to.

These parties are large dealers in coal, and therefore their sales are, by the agreement, to be taken as a means of ascertaining the market price, and not for the purpose of giving either of them the power to fix that price, or with the thought that either of them might do so. If they arbitrarily use their power to change the standard, they necessarily

destroy its authority as a standard as in their favor; for it is not their will, but the fair market price that is appealed to.

We are not entitled in this case to inquire how far a trading corporation is liable to control or punishment for recklessly raising or depressing prices, for our sole inquiry is concerning the legality of this agreement. We cannot discover any such illegality in it as would justify us in directing its cancellation. Some of the allegations of the canal company seem to show a great abuse of the agreement by the coal company, but the information is in no degree grounded on that, and we cannot inquire of it, and we must volunteer no opinion as to the fact or its consequences or remedy.

Information dismissed.[1]

HOOVER *v.* PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1893.

[156 *Pa. St.* 220.[2]]

TRESPASS for damages for alleged unlawful discrimination.

At the trial, before FURST, P. J., it appeared that, in 1881, the defendant agreed to transport coal from the Snow Shoe district to the works of the Bellefonte Iron & Nail Company for the sum of thirty cents per ton, provided the nail company consumed at least twenty tons per day. It appeared that the coal was to be tariffed at the usual public rate of fifty cents per ton, and that a rebate of twenty cents per ton net would be repaid by the railroad company to the nail company. In 1889, plaintiffs became retail coal dealers in Bellefonte, and were charged by the railroad company the usual public rate for the transportation of their coal.

Mr. Justice GREEN. . . . Let us now see what is the voice of the authorities upon the subject of discriminations in freight charges by carrying companies. The subject is an old one. Prior to any statutes in England or in this country, the common law had pronounced upon the rights and duties of carriers and freighters, and in the enactment of statutes little more has been done than to embody in them the well-known principles of the common law. It happens, somewhat singularly, that the very question we are now considering, of a discrimination in the rates charged to coal dealers and to manufacturers who use coal as a fuel, does not appear to have arisen. And yet it is very certain that such discrimination does prevail, and has prevailed for a long time on all lines of railway and canal. It is highly probable that the absence of litigation upon such discrimination is due to the general

[1] *Compare:* Union Pacific Co. *v.* Goodridge, 149 U. S. 680. — ED.

[2] This case is abridged. — ED.

sentiment of its fairness and justness. Within the writer's knowledge in the section of the State in which he lives, a much greater difference between the rates charged to dealers and those charged to manufacturers by the coal-carrying companies has always existed and now exists, without any question as to its justness or its legality. It is matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, foundries, machine shops, and numerous other manufacturing establishments which consume enormous quantities of the coal output of the State, and at the same time in every village, town, and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the State is without doubt equally true throughout the interior and western portions of the Commonwealth, where similar conditions prevail. Yet from no part of our great State has ever yet arisen a litigation which called in question the legality, or the wisdom, or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for except upon the theory that such discrimination, as has thus far transpired, has not been felt to be undue, or unreasonable, or contrary to legal warrant. In point of fact it is perfectly well known and appreciated that the output of freights from the great manufacturing centres upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. Thus a blast furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire bricks, and other materials for the maintenance of its structures and the conduct of its business, none of which are necessary to a mere coal-selling business. These are some of the leading considerations which establish a radical difference in the conditions and the circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them

is that the establishment of manufacturing industries, and the conducting of their business, necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centres of population, resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling. In fact that business is one of the results of the manufacturing business and is not co-ordinate with it. The business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent. *Judgment for defendant.*[1]

BAILY *v.* FAYETTE GAS-FUEL CO.

SUPREME COURT OF PENNSYLVANIA, 1899.

[193 *Pa. St.* 175.]

ON September 21, 23, and 24, 1898, the defendant company caused to be inserted in the Daily News Standard, published in Uniontown, an advertisement, notifying domestic consumers of natural gas that after October 1, 1898, the rates for gas would be as follows: For heat, twenty-five cents per 1,000 cubic feet; for light, $1.50 per 1,000 cubic feet; and requiring all consumers desiring to use gas for light to notify the company immediately that the light meters might be set. At or about the same time similar notices were mailed to the company's customers. The plaintiff, a resident of Uniontown, saw the notice as published and also received one by mail. On or about October 3, 1898, an employee of the defendant company notified the plaintiff orally that if he did not call immediately at the defendant's office and make arrangements for using the gas for illumination the gas would be shut off, whereupon the plaintiff filed the bill in this case, alleging that the proposed difference in charge for gas used for illuminating and heating purposes is an unjust and unlawful discrimination, and an unreasonable regulation, not made in good faith, but for the benefit of other corporations; that the proposed action of the defendant would be a violation of the plaintiff's rights and the defendant's duties and would work a continuous and irreparable injury to the plaintiff, and praying that the defendant be restrained from shutting off plaintiff's

[1] *Compare:* Grersser *v.* McGrath, 13 Fed. 373; Louisville Co. *v.* Tulghan, 91 Ala. 555; Indianapolis Co. *v.* Erwin, 118 Ill. 250. — ED.

supply of natural gas and from any interference with the connection between its mains or supply pipe and plaintiff's premises, which would prevent him from using natural gas for either heating or illuminating purposes, so long as the plaintiff continues to pay the usual rates charged generally for gas, without discriminating as to the use thereof for illuminating purposes, &c.

MITCHELL, J. The defendant company was chartered under the Act of May 29, 1885, P. L. 29, to produce, transport, supply, &c., natural gas for heat, light, or other purposes. It has been supplying the gas for both heat and light, and proposes to continue doing so, but upon terms making a difference in price according to the use to which the gas is put by the consumer. The question now before us is the reasonableness of this regulation.

In his opinion the learned judge below said, "So far as concerns this case the defendant company may be regarded as incorporated for the purpose of supplying natural gas to consumers for heat and light." Not only did its charter powers cover both uses, but as already said its actual operation has included both, and it is not intended now to abandon either, even if that could be done. The corporate powers are the measure of corporate duties.

The gas is brought by the company through the same pipes for both purposes and delivered to the customers at the same point, the curb. Thence it goes into pipes put in by the consumer, and, after passing through a meter, is distributed by the customer through his premises according to his own convenience. The regulation in question seeks to differentiate the price according to the use for heating or for light. It is not claimed that there is any difference in the cost of the product to the company, the expense of supplying it at the point of delivery or its value to the company in the increase of business or other ways. Some effort was made to show increased risk to the company from the use of gas for lighting purposes, but the evidence of danger was so remote and shadowy that it cannot be considered as more than a mere makeweight. The real argument seeks to justify the difference in price solely by the value of the gas to the consumer, as measured by what he would have to pay for a substitute for one purpose or the other if he could not get the gas. This is a wholly inadmissible basis of discrimination.

The implied condition of the grant of all corporate franchises of even quasi-public nature is that they shall be exercised without individual discrimination in behalf of all who desire. From the inception of the rules applied in early days to innkeepers and common carriers down to the present day of enormous growth of corporations for nearly every conceivable purpose, there has been no departure from this principle. And from all the legion of cases upon this subject the distinguished counsel for the appellee have not been able to cite a single one in which a discrimination based solely on the value of the service to the customer has been sustained. Hoover *v.* Penna. R. Co., 156 Pa.

220, was much relied on by the court below, but was decided on a very different principle. That was an action for damages for unlawful discrimination by a dealer in coal, because a manufacturing company had been allowed a rebate on coal carried to it. But it was held that as the rebate was allowed in consideration of a minimum of coal to be carried per day, and also in view of return freight on the product of the manufacturing company, it was not an unreasonable discrimination; in other words, that the company might look for its compensation not only to the actual money freights from present service, but also to increased business to grow out of the establishment of a new industry in that place. So also Phipps *v.* London & North Western Ry. Co., L. R. 1892, 2 Q. B. 229, cited for appellee, where the decision was put upon the right of the railroad to make special rates for freights from distant points which otherwise it could not get at all. Both cases belong to the numerous class of discrimination sustained on the basis of special advantages to the carrier, not the customer.

Decree reversed, injunction directed to be reinstated and made permanent. Costs to be paid by appellee.

LADD *v.* BOSTON.

SUPREME COURT OF MASSACHUSETTS, 1898.

[170 *Mass.* 332.[1]]

BILL in equity, filed December 31, 1896, alleging the following facts.

The plaintiff is the owner of a building on Pemberton Square in Boston, and the defendant supplies the water to be used therein. The defendant has established, and still continues, fixture rates and meter rates, in accordance with which it requires water takers to pay for the water they use. Many years ago the defendant put a water meter into the building owned by the plaintiff, and has maintained the same there ever since. At the time the meter was put in, the plaintiff, relying upon its continuance, supplied his building very liberally with water fixtures. By the meter rates, the water used in the building amounts to about five dollars each year, but the plaintiff has always paid fifteen dollars per annum, that being the minimum meter rate.

The defendant has recently adopted a policy of removing all meters where it would receive more money from fixture rates, without any regard to the injustice it will work to certain water takers. In accordance with such policy, it now threatens to remove said meter and put the building upon fixture rates, and to shut off the water unless the plaintiff allows it to do so. By fixture rates for all the fixtures in the building

[1] The case is abridged. — ED.

in actual use the plaintiff would be required to pay about one hundred and five dollars per annum. The water fixtures in the building cannot be lessened or rearranged without very great expense, and in no way can they be so lessened or rearranged as to make the fixture rate in any sense reasonable for the quantity of water used. The income from the building has largely decreased in the last few years, and is not sufficient to warrant the payment of such excessive water taxation.

The plaintiff has suggested to the defendant that the minimum meter rate be reasonably increased if it be not now large enough to be just to fixture-rate water takers, and he has offered to furnish his own private meter and pay for repairs on the same if he could thereby continue to enjoy meter rates; but this suggestion has been declined, and this offer refused. If the building is placed upon fixture rates, the plaintiff will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water.

KNOWLTON, J. . . . Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interests of property-holders, are all to be considered. Under any general and uniform system other than measuring the water, some will pay more per gallon than others.

It appears by the bill that the plaintiff has so arranged fixtures in his building that he and his tenants can obtain the convenience and benefit of having water to use in many places, while the quantity which they want to use in the whole building, paid for at the rate per gallon charged for measured water, would cost only five dollars per year. He has been accustomed to pay fifteen dollars per year, because, however small the quantity used, that is the lowest sum per year for which water will be furnished under the rules through any meter.

The only averment in the bill which tends to show that the charge for his building after the meter is removed will be unreasonable, is that he "will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water." This means that the arrangement of fixtures in his building is such that, paying by the fixture at the ordinary rate, the aggregate quantity used will be so small as to make the price per gallon twenty times as much as the price paid for measured water where meters are allowed to be used, or the lowest price paid at rates by the fixture where the largest quantities are used through the fixtures. This does not show that charging by the fixture is an improper method. It only shows that the number and arrangement of the fixtures in the plaintiff's building are uneconomical

for the owner as compared with a different construction and arrangement of the conveniences for using water in some other buildings.

The rights of the parties are not affected by the fact that the plaintiff was using a meter when he put in his fixtures. He knew that he had no contract for the future with the city in regard to the mode of fixing the price to be paid for water, and it appears that the quantity which he has been using is only about a third of the smallest quantity for which water is ever charged by the gallon, running through a meter.

The bill does not state a case for relief in equity.

Bill dismissed.

STATE EX REL. CUMBERLAND TELEPHONE AND TELEGRAPH CO. *v.* TEXAS AND PACIFIC RAILROAD CO.

SUPREME COURT OF LOUISIANA, 1900.

[28 *So. Rep.* 284.[1]]

BLANCHARD, J. . . . Defendant company is, *quoad* its lines in Louisiana, a Louisiana corporation. It acquired by purchase and absorption the franchise rights and lines of the New Orleans Pacific Railway Company, which held under a legislative charter from the State of Louisiana, and whose domicile was the city of New Orleans. See Act No. 14, Acts La. 1876, and articles of agreement of consolidation between the Texas Pacific Railway Company and the New Orleans Pacific Railway Company, found in the record. It is not true that the court, in its decree heretofore rendered, has assumed the authority to manage defendant company's railway and to direct the running of its trains. All the decree does is to require of the company the performance of the same service for relator that it has extended to others, notably the Western Union Telegraph Company. The evidence establishes that poles and materials for the construction, repair, and maintenance of the Western Union lines have been distributed by the cars of plaintiff company between stations, and that this has been going on for years, and still goes on. It also establishes that it has been constantly the practice of defendant company to deliver freight for planters and others between stations, and to receive for transportation, at points between stations, rice, sugar, &c. This being shown, it is held that the company may not discriminate, and, when called upon under conditions that are reasonable, must perform the like service for relator; and the duty, being of a public nature, is enforceable by *mandamus*. The evidence also shows that the same service herein required of defendant company has been freely accorded this relator and others by other railroad companies over their lines in this and other States. Relator, it appears, owns its own cars, on which are loaded its tele-

[1] This case is abridged. — ED.

phone and telegraph poles. It applied to defendant company to haul these cars over its lines between New Orleans and Shreveport and throw the poles off, or permit them to be thrown off, at convenient distances. Other railroad companies, operating lines of railway into and out of New Orleans, had done this, and defendant company does the same for the Western Union Telegraph Company, a rival line. It refused the service to relator. That it is the province of the court to say to this common carrier, "What you do for others you cannot refuse to relator," cannot, we think, be seriously questioned. And in so saying, and enforcing by its writs the performance of the duty, it is not apparent that defendant company is denied any of the rights, privileges, and immunities granted to it by the several acts of Congress referred to in the application for rehearing and in the briefs filed on its behalf. The rehearing applied for is denied.

CITY OF MOBILE *v.* BIENVILLE WATER SUPPLY CO.

SUPREME COURT OF ALABAMA, 1901.

[30 *So. Rep.* 445.[1]]

APPEAL from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the Bienville Water Supply Company against the city of Mobile and others. Demurrers to the bill were overruled, and defendants appeal.

HARALSON, J. . . . 3. The bill alleges that complainant is a corporation chartered by the State for the purpose of supplying and selling water to the city of Mobile and to its inhabitants; that it has laid its mains and pipes in the streets of the city and established its plant at an expense of over $800,000, and is supplying water to customers in the city for family use, sewerage, and other purposes; that the city of Mobile, by an act of the 30th November, 1898, was authorized to construct a system of waterworks and sewers for the use of itself and its inhabitants, and was empowered to collect such rates for water supplied for the use of said sewerage system as shall be sufficient to pay the interest on the bonds issued by it for the purpose of providing said waterworks and sewerage systems and the expenses necessary for operating; such rate not to exceed the usual and customary rates charged by other cities similarly situated for like service.

It was further shown, that by act February 15, 1899, entitled "An Act to promote the health of the city of Mobile," &c. (Act 1898–99, p. 895), the city was empowered to compel connections with its sewers, and for the use thereof, "to fix and charge such reasonable rates for

[1] This case is abridged. — ED.

the purpose of maintaining and operating said sewerage system and paying the interest on the bonds issued by the city of Mobile to build said sewerage system, as said mayor and general council may deem proper;" that it was empowered by another act (Acts 1898–99, p. 16), to issue $750,000 of bonds, secured by mortgage on its water and sewerage system, of which $500,000 was to be used for buying or building waterworks, and $250,000 for buying or building sewers; that it has issued and sold said bonds and built both systems, expending over $500,000 for the water system, and not over $200,000 for the sewer system; that it is operating both systems, and from its waterworks is furnishing water to itself and its inhabitants, and is supplying water on about twenty miles of streets upon which there are no sewers.

The averment is made, that the city has never fixed any rate for the use of its sewers alone, but it will not allow any customers of complainant's water to connect with or use its sewers, except at the same price as the city charges for both its water and sewers together, in effect forcing its citizens and inhabitants to take the water of the city, or to pay for the water of complainant in addition to what each citizen would have to pay for the city's water and sewerage together, discriminating, as is alleged, against complainant and making it, in effect, furnish water for nothing, or to lose its customers by reason of the double charges so imposed on them; that the city through its officers and agents threatens the people of Mobile that they will not be allowed to use the sewers, unless they subscribe for and take the city water, and that they will not be allowed to use the water of complainant in connection with the city's sewers; that the city has the physical power, by means of its police force, to enforce this threat, and it is thus intimidating the customers of complainant, and compelling them to leave complainant and take the water from the city waterworks, and upon their desiring to return, the city, through its officers, have refused to let them disconnect from the city's pipes or to connect with complainant's.

It is further averred that the city charges its own customers on streets where there is no sewer service, the same rate that it charges others for both water and sewers, along streets where said sewers are laid, which, it is alleged, is a discrimination in charges for sewerage, not only against complainant and its customers of water, but also against all consumers of water and customers of the city, not on streets or lines where the sewers are laid.

It is also averred that the city is insolvent, so that nothing can be made out of it by execution at law.

4. The first, second, third, fourth, and fifth grounds of demurrer to the amended bill may be grouped as raising in different forms, the same question. To state the contention of defendant in the language of counsel, these "grounds of demurrer challenge the sufficiency of the bill as amended, upon the ground that the bill shows that the servants and agents of the city exceeded their power and authority, [and] should have been sustained," the contention being "that said acts and

doings of said officers and agents, as charged in said bill as amended, were void and not binding upon the city of Mobile." The bill alleges, however, very distinctly that the city is committing the wrongs complained of through its officers and agents, a fact the grounds of demurrer specified clearly overlook. The city could, of course, commit the alleged wrongs in no other way, except through its agents and officers. If the acts of the city are warranted by law, it could not be enjoined from committing them. The wrongfulness of these acts is, therefore, the only predicate for relief.

5. The other grounds of demurrer to the original, refiled to the amended bill, and those added to the bill as amended, raise the more serious question to be decided.

From the facts of the case, as above recited, if true, — as they must be taken on demurrer, — it distinctly appears that the city, while it has the authority to do so, has never, by ordinance, fixed any charge or rate for the use of its sewers, and, indeed, is making no charge to its own customers for the use of the same; that it charges any one using its water alone as much as it charges another for the use of both water and sewer; and against those who use the complainant's water, it charges for sewer service alone as much as it charges its own customers for both water and sewerage, — thus making its sewers free to those who use its water, while it imposes on complainant's customers a discriminating and onerous charge for the use of its sewers, — as much, as is alleged, as it charges for its own water and sewerage in addition. Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage the same price it charges its own customers for its water and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that any one would use the complainant's water and bear the additional expense imposed for so doing. These sewers of the city are for the public at large, and every one should be permitted to use them without any discrimination in charges against him. The franchise to construct sewers being in the nature of a public use, the duty is on the city to supply sewerage rates to all impartially on reasonable terms. As is said by Mr. Bates, "All persons are entitled to have the same service on equal terms and on uniform rates." In addition, it is averred, as seen, that citizens are notified by the city that they cannot use its sewers unless they subscribe for the city water, and customers of complainant, desiring to return to it, are forbidden by the city from disconnecting from its pipes and connecting with complainant's, — a threat the city has the physical power to enforce.

If these wrongs exist, they should be remedied. The complainant is far more interested and injured than any one or all of its customers. It cannot live and enjoy the rights and privileges bestowed on it by its

charter, if by unjust discriminations on the part of the city in operating its sewer system, its customers are taken from it. Its customers might not be willing to incur the trouble and odium of litigation to redress the private wrongs thus done to them, even at complainant's expense. But, complainant itself has rights which should be protected against such alleged wrongs, and is entitled to seek redress in its own name. The city should on considerations of highest equity and justice, as by its charter it is authorized to do, fix a rate for sewer service, distinct from the rate fixed for the use of its water, and this rate should be the same to all persons, including the complainant and its customers, or, it should make them free to all, without discrimination. In other words, these sewers should be used to promote the public health, as free to one person as another, or open to all, if any rate of charges is fixed, on equal terms and on uniform charges for their use. No more than this can be justly and legally claimed by the city under its authority from the Legislature, to establish its sewer system.

6. The complainant is entitled, upon the facts stated, to the restraining power of a Court of Equity, to remedy the wrongs of which it complains. These continuing wrongs must work irreparable injury, and, as is alleged, the city, the perpetrator of the wrongs, is insolvent. High, Inj. §§ 1236, 1275; 3 Pom. Eq. Jur. § 1368.

There was no error in overruling the demurrer to the bill.

Affirmed.

PHIPPS *v.* LONDON AND NORTH WESTERN RY. CO.

COURT OF APPEAL, 1892.

[1892, 2 *Q. B.* 229.[1]]

THIS was an appeal against so much of an order of the Railway Commissioners as dismissed an application made by the executors and trustees of the late Mr. Pickering Phipps, an owner of iron furnaces at Duston, for an order enjoining the London and North Western Railway Company to desist from giving undue and unreasonable preference or advantage to the owners of iron furnaces at Butlins and Islip in respect of charges for the conveyance of pig iron to the South Staffordshire markets.

The 2d section of the Railway and Canal Traffic Act, 1854, enacts that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[1] This case is abridged. — ED.

The effect of the 27th and 29th sections of the Railway and Canal Traffic Act, 1888, is shortly as follows : —

By section 27, first, whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges, for the same or similar merchandise or services, than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of such traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference is to lie on the railway company ; and, secondly, in deciding whether a lower charge or difference in treatment amounts to an undue preference, the court, or the commissioners, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

By section 29, any railway company may, for the purpose of fixing their rates for the carriage of merchandise on their railway, group together any number of places in the same district situated at various distances from any point of destination or departure of merchandise, and charge a uniform rate in respect thereof, provided that the distances are not unreasonable and no undue preference is created.

The sidings of the Duston furnaces were situated on the London and North Western Railway Company's line at a distance of about sixty miles from Great Bridge, one of the pig iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same line to the east of the Duston furnaces, and at a distance from the market as to Butlins of about seventy-one miles, and as to Islip of about eighty-two miles. Duston was dependent for its railway carriage on the London and North Western Company alone, but Butlins and Islip had both of them access not only to the London and North Western, but also to the Midland Railway. The branch lines on which the Butlins and Islip sidings were situate united at a point to the westward, so that they were nearly equidistant from the western markets. The London and North Western Railway Company had, for charging purposes, grouped Butlins and Islip together; and although they carried the Islip pig iron eleven miles further than the Butlins, they made the same charge from both those places. The Midland Railway also charged the same rate and the same total charge per ton for the carriage from Butlins and Islip.

The London and North Western Railway Company, who carried the Butlins pig iron eleven miles further and the Islip pig iron twenty-two miles further than the Duston pig iron, charged Butlins 0.95*d.* per ton per mile, and Islip 0.84*d.* per ton per mile, while they charged Duston 1.05*d.* per ton per mile ; so that the total charge per ton of pig iron from Duston to the western markets was 5*s.* 2*d.*, while the total charge

per ton from either Butlins or Islip was 5*s.* 8*d.* for the same class of merchandise.

The allegation on the part of the plaintiffs was that to charge for the carriage of pig iron from Butlins and Islip to the market only 6*d.* more than for the carriage from Duston was, having regard to the difference of distance, an undue preference by the company in favor of Butlins and Islip as compared with Duston; and they brought this application before the Railway Commissioners under the 2d section of the Railway and Canal Traffic Act, 1854.

The case made by the company was that the comparatively lower rates charged to Butlins and Islip were forced upon them by the competition of the Midland Railway Company; that the lower charge was made *bonâ fide*, and was, in the terms of section 27 of the Act of 1888, "necessary for the purpose of securing in the interests of the public the traffic in respect of which it was made"; that there was still a difference of 6*d.* a ton in favor of the plaintiffs, and that the plaintiffs had not been injured by the rates charged to Butlins and Islip. And they produced evidence to show that the competition in the South Staffordshire market was such that a difference of 6*d.* a ton, or even less, in the price of iron of the same quality, would often be enough to secure a contract.

The Railway Commissioners (Wills, J., Sir Frederick Peel, and Viscount Cobham) held that the London and North Western Railway Company in fixing the rates in question were entitled to take into account the circumstance that Butlins and Islip had access to another line of railway which was in competition with their own, and that not sufficient case of undue preference had been made out against them.

The plaintiffs appealed.

Lord Herschell. . . . One class of cases unquestionable intended to be covered by the section is that in which traffic from a distance of a character which competes with the traffic nearer the market is charged low rates, because unless such low rates were charged it would not come into the market at all. It is certain unless some such principle as that were adopted a large town would necessarily have its food supplies greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situate nearer to it. That is one class of cases, no doubt, intended to be dealt with. I think that is made evident by the fact that they are to consider whether it is necessary for the purpose of securing the traffic, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant. But, of course, it might be said: Well, but the railway company may be obliged, in order to get the traffic, to bring those distant goods at a very cheap rate. But then let them reduce all their

rates on the intervening distances. If a man is nearer the market, let his rate be brought down accordingly, and all the rates will then come down except those from the distant point. But then it was seen there being two ways of creating absolute equality, one by raising the lower rate, another by diminishing the higher rate, there were cases where you would not secure the traffic at all if you raised the lower rate, and where, on the other hand, if, as the condition of securing the traffic, you were to insist on diminishing the higher rate, it would be so diminished as to be quite unfair to the company, and would be unduly reducing the rates charged to the complainant. Therefore, the Legislature said all those matters ought to be taken into account by the commissioners or the court so far as they think it reasonable.

I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence, is one of the circumstances which may be taken into account under those provisions, and which would fall within the terms of the enactment quite as much as the case to which I have called attention. Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices. Therefore it seems to me that, whether you look at the Act of 1854 by itself, or whether you look at it in connection with the provisions of sub-section 2 of section 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is not necessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other. That may be so, but all that is matter for the tribunal to take into account, and certainly I think that they are entitled to take it into account, and to give weight to it as far as is reasonable. If that be so, it is of course sufficient to dispose of the present case.

Appeal dismissed.[1]

[1] *Compare:* East Tennessee R. R. *v.* Interstate Commerce Commission, 183 U. S. 1. — Ed.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY *v.* INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1896.

[162 *U. S.* 184.]

MR. JUSTICE SHIRAS delivered the opinion of the court.

The investigation before the Interstate Commerce Commission resulted in an order in the following terms: —

"It is ordered and adjudged that the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in less than car loads of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the State of Ohio, to Social Circle, in the State of Georgia, than they charge or receive for the transportation of said articles in less than car loads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the State of Georgia, and that the said defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads, from Cincinnati aforesaid to Atlanta, in the State of Georgia, than one dollar per hundred pounds."

The decree of the Circuit Court of Appeals, omitting unimportant details, was as follows: —

"It is ordered, adjudged, and decreed . . . that this cause be remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, the Interstate Commerce Commission, and against the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on all other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree; and in case they, or any of them, shall fail to obey said order, condemning the said defendants, and each of them, to pay one hundred dollars a day for every day thereafter they shall so fail; and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that in its said decree the Circuit Court of Appeals adopted that portion of the order of the commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans, & Texas Pacific Railway Company and the Western & Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than $1 per 100 pounds.

The railroad companies, in their appeal, complain of the decree of the Circuit Court of Appeals in so far as it affirmed that portion of the order of the commission which affected the rates charged to Social Circle. The commission, in its appeal, complains of the decree, in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management, or arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce.

We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being $1.37 per hundred pounds, is made up of a joint rate between Cincinnati and Atlanta, amounting to $1.07 per hundred pounds, and 30 cents between Atlanta and Social Circle, and as the $1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans, and Texas Pacific and the Western and Atlantic, $75\frac{1}{10}$ cents to the former and $31\frac{1}{10}$ cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle and of apportioning the money earned, is not a transportation of property between those points "under a common control, management, or arrangement for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the State of Georgia, and as its road lies wholly within that State, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of Congress.

It is, no doubt, true that, under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly

within one State, not shipped to or from a foreign country from or to any State or Territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the commission, there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle to the through rate from Cincinnati to Atlanta."

The answer of the Louisville & Nashville Railroad Company and Central Railroad & Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the Circuit Court of the United States, contained the following statement: —

"So far as these respondents are concerned, they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections, earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia Railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia Railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other Western points to any of the strictly local stations on said Georgia Railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta east-bound freight destined to strictly local stations on the Georgia Railroad, and have charged full local rates to such stations, said rates being such as they were authorized to charge by the Georgia Railroad commission. Said rates are reasonably low, and are charged to all persons alike, without discrimination."

Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

We are unable to accept this conclusion. It may be true that the Georgia Railroad Company, as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of

any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points.

The Circuit Court sought to fortify its position in this regard by citing the opinion of Mr. Justice Brewer in the case of Chicago & Northwestern Railroad *v.* Osborne, 10 U. S. App. 430, when that case was before the United States Circuit Court of Appeals for the Eighth Circuit. It is quite true that the opinion was expressed that a railroad company incorporated by and doing business wholly within one State cannot be compelled to agree to a common control, management, or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not follow that, even if such a State corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the State.

Thus understood, there is nothing in that case which we need disagree with, in disapproving the Circuit Court's view in the present case. All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one State to a point in another, are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a "through bill of lading," we are referring to the usual method in use by connecting companies, and must

not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between States, under "substantially similar circumstances and conditions."

We do not say that under no circumstances and conditions would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that in the present case the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon, whereby the same charge was made to Augusta as to Atlanta, — a less distant point. Some observations made by the commission, in its report, on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

These views lead to an affirmance of the decree of the Circuit Court of Appeals, in so far as the appeal of the defendant companies is concerned, and we are brought to a consideration of the appeal by the Interstate Commerce Commission.

That appeal presents the question whether the Circuit Court of Appeals erred in its holding in respect to the action of the Interstate Commerce Commission, in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the commission, namely: Did the court err in not holding that in point of law the Interstate

Commerce Commission had power to fix a maximum rate? and, if such power existed, did the court err in not holding that the evidence justified the rate fixed by the commission, and not decreeing accordingly ?

It is stated by the commission, in its report, that " the only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the Vice-President of the Cincinnati, New Orleans, & Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject the commission say: —

" This statement or estimate of the rate from Cincinnati to Atlanta ($1.01 per hundred pounds in less than car loads), we believe, is fully as high as it may reasonably be, if not higher than it should be; but, without more thorough investigation than it is now practicable to make, we do not feel justified in determining upon a more moderate rate than $1 per hundred pounds of first-class freight in less than car loads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with $1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the commission filed its petition in the Circuit Court of the United States, seeking to enforce compliance with the rate of $1 per 100 pounds, as fixed by the commission, the railroad companies, in their answers, alleged that " the rate charged to Atlanta, namely, $1.07 per hundred pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken, and we learn from the opinion of the Circuit Court that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis, & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and, by reason of water route to the Northwest, such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the Circuit Court, which will be found in the report of the case in 64 Fed. 981, the conclusion reached was that the evidence offered in that court was sufficient to overcome any *prima facie* case that may have been made by the findings of the commission, and that the rate complained of was not unreasonable.

As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first-class freight carried on defendants' line from Cincinnati to Atlanta; and, as both courts found the existing rate to

have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the commission, and first adduce it in the Circuit Court. The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision, that the findings of the commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved.

Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of Interstate Commerce Commission *v.* Baltimore & Ohio Railroad Co., 43 Fed. 37, and whose judgment was affirmed by this court, 145 U. S. 263: —

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, — free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The decree of the Circuit Court of Appeals is affirmed.

INTERSTATE COMMERCE COMMISSION v. DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[167 *U. S.* 633.]

MR. JUSTICE SHIRAS delivered the opinion of the court.[1]

The petition of Stone & Carten, retail merchants at Ionia, addressed to the Interstate Commerce Commission, alleged violations by the railway company of sections 2, 3, and 4 of the Interstate Commerce Act.

The opinion of the commission sustained the petition avowedly under section 4 of the act. . . .

The sole complaint urged is that the railway company carts goods to and from its station or warehouse at Grand Rapids without charging its customers for such service, while its customers at Ionia are left themselves to bring their goods to and take them from the company's warehouse, and that, in its schedules posted and published at Grand Rapids, there is no notice or statement by the company of the fact that it furnishes such cartage free of charge. These acts are claimed to constitute violations of sections 4 and 6 of the Interstate Commerce Act. . . .

For a period of upward of twenty-five years before these proceedings this company has openly and notoriously, at its own expense, transferred goods and merchandise to and from its warehouse to the places of business of its patrons in the city of Grand Rapids. The station of the company, though within the limits of the city, is distant, on an average, 1¼ miles from the business sections of the city where the traffic of the places tributary to the company's road originates and terminates. . . .

Under the facts as found and the concessions as made, the Commission's proposition may be thus stated. There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities. But, as there is an average distance

[1] Part of the opinion is omitted.

of $1\frac{1}{4}$ of a mile between the station at Grand Rapids and the warehouses and offices of the shippers and consignees, such average distance must be regarded as part of the railway company's line, if the company furnishes transportation facilities for such distance; and if it refrains from making any charge for such transportation facilities, and fails to furnish the same facilities at Ionia, this is equivalent to charging and receiving a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

The Circuit Court of Appeals was of opinion that this proposition is based on a false assumption, namely, that the distance between the company's station and the warehouses of the shippers and consignees is part of the company's railway line, or is made such by the act of the company in furnishing vehicles and men to transport the goods to points throughout the city of Grand Rapids. The view of that court was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage. The court, in a learned opinion by District Judge Hammond, enforced this view by a reference to numerous English cases, which hold that the collecting and delivery of goods is a separate and distinct business from that of railway carriage; that, when railroad companies undertake to do for themselves this separate business, they thereby are subjected to certain statutory regulations and restrictions in respect to such separate business; and that they cannot avoid such restrictions by making a consolidated charge for the railway and cartage service. 43 U. S. App. 308.

We agree with the Circuit Court of Appeals in thinking that the fourth section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles, or by those furnished by the railway company, would not concern the Interstate Commerce Commission. . .

The decree of the Circuit Court of Appeals is affirmed.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA MIDLAND RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[168 *U. S.* 144.]

On the 27th day of June, 1892, the board of trade of Troy, Ala., filed a complaint before the Interstate Commerce Commission, at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections; claiming that, in the rates charged for transportation of property by the railroad companies mentioned, and their connecting lines, there was a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint was that, Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and gave the latter an undue preference or advantage, in respect to certain commodities and classes of traffic.[1] . . .

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified. . . .

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Several of the assignments of error complain of the action of the Circuit Court of Appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates to be thereafter charged by the defendant companies for services performed in the transportation of goods.

Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute, and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly, by empowering that tribunal, after having

[1] Part of the statement of facts is omitted. — ED.

determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. Cincinnati, New Orleans, & Texas Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 184; Interstate Commerce Commission *v.* Cincinnati, New Orleans, & Texas Pacific Railway, 167 U. S. 479.

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other Northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments, or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities, and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission, under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended in the briefs filed on behalf of the Interstate Commission that the existence of rival lines of transportation, and consequently of competition for the traffic, are not facts to be considered by the commission or by the courts when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery

and Troy, respectively, and that among the errors assigned is one complaining that the court erred in not holding that the rates prescribed by the commission in its order made due allowance for such dissimilarity.

So, too, in In re Louisville & Nashville Railroad, 1 Interst. Commerce Com. R. 31, 78, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the house bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was, beyond doubt, especially in view."

It is no doubt true that in a later case (Railroad Commission of Georgia *v.* Clyde S. S. Co., 5 Interst. Commerce Com. R. 326) the commission somewhat modified their holding in the Louisville & Nashville Railroad Company Case, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, and competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 Fed. 315; Missouri Pacific Ry. *v.* Texas & Pacific Ry., Id. 862; Interstate Commerce Commission *v.* Atchison, T. & S. F. Railroad, 50 Fed. 295; Interstate Commerce Commission *v.* New Orleans & Texas Pacific Railroad, 56 Fed. 925, 943; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835; Interstate Commerce Commission *v.* Louisville & Nashville Railroad, 73 Fed. 409.

In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. Denaby

Main Colliery Co. v. Manchester, Sheffield, & Lincolnshire Railway, 11 App. Cas. 97; Phipps v. London & Northwestern Railway, [1892] 2 Q. B. 229.

But the question whether competition, as affecting rates, is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In Interstate Commerce Commission v. Baltimore & Ohio Railroad, 145 U. S. 263, it was said, approving observations made by Jackson, Circuit Judge (43 Fed. 37), that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road; in other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute, — only such as are unjust or unreasonable"; and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual, within the meaning of the first section of the act to regulate commerce, nor make "an unjust discrimination" against him, within the meaning of the second section, nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket, within the meaning of the third section.

In Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S. 197, it was held that, "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign

freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of Wight *v.* U. S., 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase, "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such

cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this: that when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows: —

"That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the Commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of In re Louisville & Nashville Railroad *v.* Interstate Commerce Commission, 1 Interst. Commerce Com. R. 31, 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words, "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful, if it was so before; and that which it fails to forbid the carrier is left at liberty to do, with-

out permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences, but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the Circuit Courts. Interstate Commerce Commission *v.* Atchison, Topeka, &c. Railroad, 50 Fed. 295, 300; Interstate Commerce Commission *v.* Cincinnati, N. O. & Tex. Pac. Ry., 56 Fed. 925, 942; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835, 839. And we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do. Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions

may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact, depending on the matters proved in each case. Denaby Main Colliery Co. *v.* Manchester, &c. Ry. Co., 3 Railway & Can. Cas. 426; Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229; Cincinnati, N. O. & Tex. Pac. Ry. *v.* Interstate Commerce Commission, 162 U. S. 184, 194; Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, 235.

The Circuit Court, after a consideration of the evidence, expressed its conclusion thus: —

"In any aspect of the case, it seems impossible to consider this complaint of the board of trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the Interstate Commerce Act. The conditions are not substantially the same, and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the Commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered." 69 Fed. 227.

The Circuit Court of Appeals, in affirming the decree of the Circuit Court, used the following language: —

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The commission finds that no departure from the long and short haul rule of the fourth section of the

statute, as against Troy, as the shorter distance point, and in favor of Montgomery, as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question, when separately considered, are not unreasonable or unjust. As a matter of business necessity, they are the same by each of the railroads that reach Troy. The Commission concludes that as related to the rates to Montgomery, Columbus, and Eufaula the rates to and from Troy unjustly discriminate against Troy, and, in the case of the Alabama Midland, violate the long and short haul rule.

"The population and volume of business at Montgomery are many times larger than at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated, by the traffic association, in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy, that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects, to a degree less or more, all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by the Board of Trade. We do not discuss the third and fourth contention of the counsel for the appellant, further than to say that within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or

unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." 41 U. S. App. 453.

The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the commission, and afterwards by the Circuit Court and by the Circuit Court of Appeals.

The first contention we encounter upon this branch of the case is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute, and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact, and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court

is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.

In the case of Cincinnati, N. O. & Texas Pac. Railway *v.* Interstate Commerce Commission, 162 U. S. 184, the findings of the commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence, and reversed, by the Circuit Court of Appeals; and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that, as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this court to review their decisions.

So in the case of Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the case under consideration the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence, and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act, authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the Commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support; giving effect, however, to the findings of fact in the report of the Commission, as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by

either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from competition; and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice Harlan, dissenting. — I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body, for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to

secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centres of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

CHAPTER III.

RIGHTS OF PUBLIC CALLING.

Section I. To make Regulations.

PENNSYLVANIA COAL CO. *v.* DELAWARE AND HUDSON CANAL CO.

Court of Appeals, New York, 1865.

[31 *N. Y.* 91.]

Davies, J. The defendant is the owner of a canal extending from tide water on the Hudson River, to the interior of the State of Pennsylvania. The plaintiff is the owner of extensive coal mines, bordering on the defendant's canal, which it mines for transportation to market. For such purpose, it is the owner of a large number of canal boats navigating the defendant's canal. By an agreement or deed, made and entered into between the parties to this action, dated 29th July, 1851, the defendant covenanted and agreed with the plaintiff, to furnish to any and all boats owned or used by the plaintiff for the purpose of transporting coal entering the said canal, by railroad connecting with the said canal, at or near the mouth of the Wallenpaupack River, or containing coal, entering as aforesaid, belonging to or transported by or on account of the plaintiff, in which coal, or the transportation thereof, the plaintiff might be in any manner interested, all the facilities of navigation and transportation which the said canal should furnish, when in good, navigable condition and repair, to boats used by any other company or person, or belonging to or used by or containing coal transported by or for or on account of the defendant. The plaintiff alleged a breach of said contract or agreement in this, that the number of boats employed by the plaintiff in the transportation of coal upon said canal, was greater than the number employed by the defendant therein, and that the boats of the plaintiff, and those employed by it, made their trips in much shorter time than the boats of the defendant, and therefore the act of the defendant in neglecting and refusing to pass the boats of the plaintiff through the locks on said canal in the order in which they arrived at the locks respectively, but delaying them

until one of the boats of the defendant, or of some individual, arriving after the plaintiff's boat at such lock, had been passed, was highly injurious and of great detriment to the plaintiff. The plaintiff prays judgment, that the defendant may be decreed and adjudged to use and manage said canal and the locks thereon, in such manner as not to impede, hinder, or delay the boats of the plaintiff navigating the said canal, and used for the purpose of transporting coal entering said canal at or near the mouth of the Wallenpaupack River, or containing coal, and entering as aforesaid, belonging to or transported by or on account of the plaintiff, and may be restrained from giving the preference of passage through any lock thereon to some other boat than the plaintiff's, although the latter arrived first at such lock, and that the defendant might be decreed specifically to perform its said agreement with the plaintiff.

The case was tried by the court without a jury, and the court found as matter of fact, that the plaintiff had not proven a breach of the contract, and the court thereupon gave judgment for the defendant, denying the relief asked for, and denying the injunction prayed for and dismissing the complaint with costs. The General Term, on appeal, affirmed this judgment, and the plaintiff now appeals to this court.

The only ground upon which the plaintiff could invoke the aid of a court of equity to decree a specific performance of the contract, and to restrain the defendant from its violation, was that there had been a breach of the contract and a violation, or a threatened violation of it. This was the foundation of the plaintiff's edifice, the corner stone upon which it rested. The finding by the court, that no breach or violation of the contract had been proven, entirely demolishes all claim of the plaintiff to any equitable relief. No threatened violation of the contract is alleged or pretended, and it follows that the judgment of the Supreme Court on this state of facts was correct, and the same should be affirmed.

MULLIN, J. Two questions only are presented for consideration on this appeal. These are: 1st. Whether the contract between the parties had been violated. And if it has, then, 2d. Are the plaintiffs entitled to a specific performance of the contract.

1. Have the defendants broken the contract?

The defendants obligated themselves by the agreement to furnish to the plaintiffs' boats all the facilities of navigation and transportation which their canal should afford, when in good and navigable condition and repair, to boats owned or used by any other company or person, or owned or used by the defendants for the transportation of coal.

The contract, it will be perceived, is not, as the plaintiffs' counsel seems to construe it, that the defendants will afford to the plaintiffs' boats all the facilities of navigation that the canal, when in good order, shall afford, but it is to furnish all the facilities to the plaintiffs that the canal, when in good order, shall afford to any other person's or company's boats, including defendants' own boats.

Before the plaintiffs can insist that the contract has been violated as to its boats, they were bound to show what facilities were afforded by the canal, when in good order, to other boats. No difference is shown to have been made between the plaintiffs' boats and those of other owners, in the facilities extended in the business of navigating the canal.

The defendants, as owners, had the right to prescribe such reasonable rules and regulations for the government of vessels passing along their canal, as their directors deemed best calculated to promote their own interests and the interests of those engaged in navigating the canal. Such regulations must embrace the order in which boats should pass through the locks. Such regulations, while resting largely in the discretion of the officers of the company, must, nevertheless, be reasonable. Now, it appears that all boats passing to the Hudson River, were locked through the Eddyville lock in the order of their arrival at such lock. This regulation is not complained of; but it is insisted that the same rule should be observed in locking up through the same lock the empty boats, and that the omission to do so is a breach of the agreement. It is claimed that the detention of plaintiffs' boats, if they first arrive at the lock, until boats of the defendants, subsequently arriving, are locked through alternately with plaintiffs', causes unreasonable delay, and is an unjust detention of the plaintiffs' boats.

When the plaintiffs' boats arrive at the lock first, it does seem to be oppressive to require any of them to be delayed until the boats of other persons, subsequently arriving, are locked through. But it must sometimes happen that the defendants' boats arrive first, and if they are delayed until the plaintiffs' boats, subsequently arriving, have been passed through, the plaintiffs have the benefit of the same rule which operated injuriously when their boats were first at the lock. While the rule is uniformly and impartially applied, it is difficult to see how it operates to the prejudice of the plaintiffs rather than to that of all others navigating the canal. While it is true that the plaintiffs owned the largest number of boats, it does not follow, nor is it proved, that their boats are uniformly first at the lock on their way back to the mines. If they are not, then they must take the delay imposed upon them by the regulation in compensation for the benefit derived from passing alternately with boats arriving at the lock before those of the plaintiffs.

It does not appear that the regulation complained of was a new one. It may have been, and in the absence of both allegation and proof to the contrary, I think we are bound to presume that it had been in force from the making of the contract; and if so — if the plaintiffs had acquiesced in it for so long a time — it is somewhat late to complain of it.

If the regulation was designed to embarrass the plaintiffs, it is difficult to see why it should not have been applied to the boats coming to as well as to those going from the Hudson. There would seem to have

been some reason for the discrimination, but what it is is not disclosed by the case.

A reason is suggested by the respondents' counsel which would seem to account for the regulation, and is probably the true one, and that is, that as but a single boat, or at most but a very limited number of boats is being laden at the same time, by either party, it is no cause of delay that the empty boats arrive one after the other, at intervals of twenty minutes; for if twenty or thirty boats arrive at one time, they must be detained until those ahead are loaded, and the result would be, that while nothing would be gained by the plaintiffs, considerable time would be lost by the other boats compelled to wait until all of plaintiffs' boats had passed through. By the regulation, it would seem that plaintiffs' boats are passed up as fast as they are required to be loaded, and that unnecessary delay to the defendants' boats is avoided.

A preference seems to be given to transient boats over those of either the plaintiffs or defendants. In what business these transient boats were employed, or their number, or who were the owners, does not appear. But it is probable that they were boats engaged in the transportation of property other than coal, and that the number was small compared with the number owned by the plaintiffs or defendants. If these conjectures are correct, they would account for the preference given to such boats in passing the lock. It would be very harsh to require a man, owning a single boat, to be detained until thirty or forty boats, arriving ahead of him, were got through the lock. And, when a preference was given to one such boat, it became necessary to extend it to all, and it does not appear that the preference delayed the loading of any of the plaintiffs' boats. This delay, and not that at the lock, would be the cause of damage of which the plaintiffs could justly complain. If the boats, on arriving at their place of destination, would have been detained as long before being loaded as they lay at the lock, it is not perceived how the plaintiffs could be damnified.

In a word, the regulation is one that the defendants had the right to make; it is not shown to be either unreasonable or unjust, nor that it has been the cause of any real injury to the plaintiffs. It seems to have been acquiesced in for a long time, and no reason is perceived why it should now be repudiated or annulled.[1]

Judgment affirmed.[2]

[1] The learned judge also held that no case had been shown for equitable jurisdiction. — Ed.

[2] *Compare:* Macon R. R. *v.* Johnson, 38 Ga. 409; Lake Shore R. R. *v.* Brown, 123 Ill. 162; Decuis *v.* Benson, 27 La. Ann. 1; Day *v.* Owen, 5 Mich. 520; Johnson *v.* Concord Corp., 46 N. H. 213; Whitesell *v.* Crane, 8 Watts & S. 369. — Ed.

POPE *v.* HALL.

SUPREME COURT OF LOUISIANA, 1859.

[14 *La. Ann.* 324.]

MERRICK, C. J. This suit has been brought against Messrs. Hall & Hildreth, the proprietors of the well-known St. Charles Hotel, of this city, to recover of them three hundred and forty-five dollars, for a watch and chain and gold coin, alleged to have been stolen from the trunk of the plaintiff whilst lodging with the defendants as a traveller.

The case was tried without the intervention of a jury, and an elaborate examination of the law and facts by the learned judge of the District Court resulted in a judgment in favor of the plaintiff for $300; defendants have appealed.

At the head of each stairway a large card was posted, cautioning the boarders to beware of hotel thieves, and requesting them to deposit all money, jewelry, watches, plate, or other valuables, in the safe at the office, and notifying the guests that the proprietors would not be responsible for any such articles stolen from the rooms.

The regulations of the hotel were posted in print in each of the rooms. Among other regulations, is stated that "money and articles of value may be deposited and a receipt taken, and no remuneration may be expected if lost when otherwise disposed of."

The defendants contend that the innkeeper has the right to say where the property shall be kept as a sequence of his responsibility; that if he is to be held responsible as a custodian, he must be permitted to guard the property in his own way, and they derive this right to limit the responsibility from the Roman law, and cite the concluding paragraph to law 7. Dig., lib. 4, tit. 9, *De protestatione exercitoris.* It is as follows: —

Item si prædixerit, et unusquisque rectorum res suas servet, neque damnum se præstaturum, et consenserint vectores predictioni, non convenitur.

It will be observed in the text cited, that the master of the ship limits his liability only by the actual consent of the passengers. In the present case, this right is claimed to the innkeeper without such express consent of the traveller.

Without reviewing the cases, or entering into the prolix discussions which this question has given rise to in France, England, and the United States, it is sufficient to say that we think the district judge very correctly took a distinction between articles of value and those ordinarily worn, together with such small sums of money as are usually carried about the person. He says, in conclusion: "They (innkeepers) have no right to require a traveller to deliver up to them his necessary

baggage, his watch, which adorns his person and is a part of his personal apparel, and the money which he has about him for his personal use. Such a regulation is contrary to law and reason. If he had large sums of money or valuables the rules might be different.

Under this view of the case, which we adopt, it is a matter of indifference whether the plaintiff did or did not read the notices posted in the hotel.

The traveller who arrives at the inn where he intends to lodge during the night, ought not to be required to part with his watch which may be necessary to him to regulate his rising, or to know when the time of departure of the morning train or boat has arrived. Neither ought he to be required to deposit with the innkeeper such small sums of money as are usually carried by the majority of persons in the like condition in life visiting such hotel.

The innkeeper should provide safe locks or fastenings to the rooms, and in default of the same, he must be held responsible for the loss of such articles of apparel and small sums of money as are usually carried or worn by the class of persons favoring the hotel with their patronage.

The estimate of the damage sustained by the plaintiff is justified by the proof. *Judgment affirmed.*

Voorhies, J., absent.

FULLER *v.* COATS.

Supreme Court of Ohio, 1868.

[18 *Oh. St.* 343.]

The original action was brought by the plaintiff to recover of the defendants the value of an overcoat and articles in the pockets thereof, alleged to have been lost from the hotel of the defendants while the plaintiff was a guest therein. The petition contains the ordinary averments to charge upon the innkeepers a liability for the loss of the goods of their guest.

The answer denies the material averments in the petition; and, by way of defence, alleges that the defendants "had prepared a place in their office for the deposit of overcoats, and other articles of personal apparel not left in the rooms as baggage, and kept there a person to receive such articles and give to the owner a check therefor, and they required guests to so deposit such articles; of all which the plaintiff had notice; that the plaintiff neglected and omitted to leave his overcoat, with its contents, in the custody of defendants, but carelessly and negligently hung the same up in the open hall of the inn without any notice to the defendants, and without any knowledge on their part that he had so negligently exposed the same; and that while so carelessly exposed by the plaintiff, said overcoat was, without the knowledge or

fault of the defendants, stolen, as they suppose. And so the defendants say that said overcoat was lost through and by reason of carelessness and negligence of the plaintiff, and that the negligence of the plaintiff contributed to the loss thereof."

The plaintiff denies, in his reply, that he had "notice that defendants required their guests to deposit overcoats in a place which defendants had prepared for that purpose; and denies that he negligently or carelessly left said overcoat in an open hall, or that he in any way, by any carelessness of himself, contributed to its loss."

The case was tried to a jury. On the trial the plaintiff proved that he was a guest at the hotel of the defendants on the 12th of December, 1865, when the coat was lost; that he came down from his room, late in the morning, to breakfast, with his overcoat, and, instead of going to the office, he hung up his coat in the hall, where there were three or four rows of hooks, and went into breakfast from the hall; and that when he came out his coat was gone. The plaintiff testified, on cross-examination, that he knew there was a place at the office where carpet-bags and coats were taken and checks given therefor, and that he had before deposited coats at the office.

One of the defendants testified that they kept a place back of the counter, in the office, where they kept and checked coats and satchels; that he had frequently checked the plaintiff's satchel there before the 12th of December; that they kept some one there to receive these articles and give checks therefor; that the plaintiff had stayed there at different times before for several days at a time; and that when the coat was lost, a general search was made for it, and it could not be found; that the hooks in the hall were for hats, and were placed in three or four rows, beginning two or three feet from the floor; that they had large printed notices in the office and some other rooms (but not in the hall), that "persons stopping at this hotel will please have their baggage checked, carpet-bags, and coats; and if they have any diamonds, precious stones, watches, or jewelry, they must be kept in the office, in order to make the proprietors responsible."

The court charged the jury as follows:

"4. The defendants had a right to require that the plaintiff should place his overcoat, &c., in a designated place in the office, or keep it in his own room when it is not on his own person, or in his own personal custody; and if they did so require, and brought this requirement to the knowledge of the plaintiff; and if you shall find that the requirement was a reasonable one, and that the property was lost in consequence of the refusal or neglect of the plaintiff to comply with such reasonable precaution, he is not entitled to recover in this action.

"5. The defendants had the right to make reasonable rules and regulations for their own protection, and to limit, to some extent, their liability; but, in order to so limit their liability in this case, it must be shown that the knowledge of the existence of such a rule or regulation was brought home to the plaintiff before the loss of his property.

"6. A printed request merely posted in the rooms of the house, requesting or asking guests to leave their overcoats, carpet-sacks, or other baggage in the care of the landlord or his servants in the office, will not relieve the defendants from liability in case of its loss. To have this effect, the notice must state in clear and unequivocal terms that they will not be responsible for the loss unless the property is left in the office, or other designated place; and must be brought to the knowledge of the guest."

The jury returned a verdict for the defendants. The plaintiff moved for a new trial, on the ground [among others] that the court erred in the charge to the jury. The court overruled the motion for a new trial; to which exception was taken.[1]

Day, C. J. Three classes of questions are raised in this case in which, it is claimed, the court below erred: 1. In permitting the defendant to ask his witnesses on the trial illegal questions; 2. In the refusal of the court to charge the jury as requested by the plaintiff, and in the charge given; 3. In overruling the motion for a new trial.

Nothing practically will be gained by considering here at length the separate questions raised by the objections of the plaintiff to the questions propounded by the defendants to their witnesses on the trial; for some of the objections are based upon grounds that must be considered in another form, arising upon the charge to the jury; some of the questions were unobjectionable, and of little or no importance; but chiefly for the reason that the testimony elicited on all the questions in no way tended to prejudice the plaintiff; and for that reason, under the provisions of the 138th section of the code, the ruling of the court on that class of questions will not afford sufficient ground to disturb the judgment.

Did the court erroneously charge the jury?

By the statute of this State the common-law responsibility of innkeepers, as to all goods therein enumerated, is materially modified. The goods sued for in this case are not mentioned in the act; it has, therefore, no application to the case, further than the reason of the legislative policy on which it is based may be regarded in deciding cases between conflicting constructions of the rules of common law, by which this case must be determined.

It is claimed that the common law makes an innkeeper an insurer of the goods of his guest, as it does a common carrier of goods, against all loss, except that occasioned by act of God or the public enemy.

The rules of the law controlling both these classes of liability have their foundation in considerations of public utility; but it does not therefore follow that the rule in every case is precisely the same. It would seem, rather, that where the circumstances of the two classes differ, public utility might reasonably require a corresponding modification of the rules applicable to the case.

[1] Only so much of the case as involves the validity of the regulations is given. — Ed.

Common carriers ordinarily have entire custody and control of the goods intrusted to them, with every opportunity for undiscoverable negligence and fraud; and are therefore held to the most rigid rules of liability. Innkeepers may have no such custody of the goods of their guests. In many instances their custody of the goods is mixed with that of the guest. In such cases it would be but reasonable that the guest, on his part, should not be negligent of the care of his goods, if he would hold another responsible for them. The case of a carrier and that of an innkeeper are analogous; but, to make them alike, the goods of the guest must be surrendered to the actual custody of the innkeeper; then the rule would, undoubtedly, be the same in both cases.

We are not, however, disposed to relax the rules of liability applicable to innkeepers, nor to declare that they are different from those applying to carriers, further than a difference of circumstances between innkeeper and guest may reasonably necessitate some care on the part of the latter.

The charge of the court below is not inconsistent with a recognition of the same extent of liability in both classes of cases; for it is well settled that an action against a carrier cannot be maintained where the plaintiff's negligence caused, or directly contributed to the loss or injury. Upon this theory, and assuming to the fullest extent the *prima facie* liability of the innkeeper, by reason of the loss, the court said to the jury: "The only question for your consideration is whether the plaintiff's negligence caused, or directly contributed to, the loss of the property."

It was thus held by the court, and conceded by the counsel for the plaintiff, that if the property was "lost by reason of the negligence of the plaintiff to exercise ordinary care for its safety," the defendants were not liable.

The essential question, then, between the parties is, what, on the part of the guest, is ordinary care, or what may be attributed to him as negligence.

It is claimed that the court erred in relation to this point, in two particulars: 1. In holding that the guest might be chargeable with negligence, in the care of his goods, in any case where they were not actually upon his person; 2. In holding that the innkeeper could, in any manner, limit his liability for the loss of the goods of his guest, except by contract with him.

If the guest take his goods into his own personal and exclusive control, and they are lost, while so held by him, through his own neglect, it would not be reasonable or just to hold another responsible for them. This is conceded to be true as to the clothes on the person of the guest, but is denied as to property otherwise held by him. There is no good reason for the distinction; for the exemption of the innkeeper from liability is based upon the idea that the property is not held as that of a guest, subject to the care of the innkeeper, but upon the responsi-

bility of the guest alone; and, therefore, it makes no difference, in principle, whether it is on his person or otherwise equally under his exclusive control. But this must be an exclusive custody and control of the guest, and must not be held under the supervision and care of the innkeeper, as where the goods are kept in a room assigned to the guest, or other proper depository in the house.

The public good requires that the property of travellers at hotels should be protected from loss; and, for that reason, innkeepers are held responsible for its safety. To enable the innkeeper to discharge his duty, and to secure the property of the traveller from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost, solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise, would subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent. Story's Bail. secs. 472, 483; Ashill *v.* Wright, 6 El. & Bl. 890; Purvis *v.* Coleman, 21 N. Y. 111; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.

Nor does the rule thus indicated militate against the well-established rule in relation to the inability of carriers to limit their liability; for it rests upon the necessity that, under different circumstances of the case, requires the guest to exercise reasonable prudence and care for the safety of his property.

In connection with the two foregoing propositions, the correctness of the holding of the court below, as stated in the seventh paragraph of the charge, is questioned. Without repeating that paragraph here, it is only necessary to say that upon the hypothesis there stated, the guest, by what he did and neglected to do, would directly contribute to the loss of his property. The charge was therefore right.

Taking the whole charge together, so far as it related to the case, and is controverted, it is in harmony with the views herein expressed, and must therefore be approved. It also follows, from what has been said, that the court did not erroneously refuse to charge the jury as requested by the plaintiff. The request contained a connected series of propositions, some of which, at least, were unsound in law. It is well settled that in such a case the court may properly refuse the whole.

It remains to be considered whether the court erroneously overruled the motion for a new trial, on the ground that the verdict was against the evidence.

While we are not clear from doubt on this point, upon a careful consideration of the evidence we are constrained to say that the verdict is not so clearly against the evidence as to warrant us in holding that the court erred in refusing to set it aside. *Judgment affirmed.*[1]

REESE *v.* PENNSYLVANIA RAILROAD.

SUPREME COURT OF PENNSYLVANIA, 1890.

[131 *Pa.* 422.]

ON October 31, 1888, L. B. D. Reese brought trespass against the Pennsylvania Railroad Company to recover damages for the alleged unlawful ejecting of the plaintiff from a passenger train of the defendant. Issue.

At the trial on September 17, 1889, the following facts were shown: About eleven o'clock on the evening of October 24, 1888, the plaintiff, in company with two friends, boarded a passenger train of the defendant company at East Liberty station, in the city of Pittsburgh, for the purpose of going to the Union station in said city. The testimony for the plaintiff tended to prove that they arrived at East Liberty station just as the train was about to start, and too late to get tickets; while witnesses for the defendant testified that the plaintiff and his companions were at the station some minutes before the train left. The ticket office at East Liberty was kept open the usual length of time prior to the departure of that train, and afforded all persons who were at the station before it started an opportunity to procure tickets.

The defendant company was incorporated by Act of April 13, 1846, P. L. 312, § 21 of which provides that "in the transportation of passengers, no charge shall be made to exceed three cents per mile for through passengers, and three and one-half cents per mile for way passengers."

After the train had started, the conductor called upon the plaintiff for his ticket, when the plaintiff stated that he had none and tendered to the conductor the sum of fourteen cents in cash. The distance between the East Liberty and Union stations is four and one half miles, and the regular and uniform fare charged by the defendant between those points was fourteen cents, being at the rate of three cents a mile. The company, however, had a regulation requiring passengers without tickets to pay to the conductor, in addition to the regular fare of three cents per mile, the additional sum of ten cents. The amount so to be paid in excess of the regular fare was uniform in all cases, irrespective of the distance the passenger was travelling,

[1] *Compare:* Milford *v.* Wesley, 1 Wilson, 119; Bodwell *v.* Bragg, 29 Ia. 232; Pope *v.* Hall, 14 La. Ann. 324. — ED.

and upon its payment the conductor was required to give to the passenger a memorandum or check, signed by the general passenger agent of the company, redeemable at ten cents on presentation at any ticket office of the company along its road. This memorandum is known as a "duplex ticket," the conductor being required to retain and forward to the auditor of passenger receipts a duplicate of each one issued. It is printed upon a form so arranged that the stations from and to which fare is collected can be indicated upon it by punch marks, and conductors are required to do this in all cases. Of this regulation, notice was given to the public by printed cards posted at the company's ticket offices.

Acting under the regulation of the company respecting the payment of cash fares, the conductor refused to accept the fourteen cents tendered him by the plaintiff and demanded twenty-four cents. The plaintiff declined absolutely to pay more than fourteen cents, whereupon he was put off the train at Roup station.

The jury rendered the following verdict: "We find for the plaintiff in the sum of two hundred and fifty dollars ($250). And we have further answered the annexed questions submitted to us for answer as part of the verdict:

"1. Did the plaintiff, Mr. Reese, on the evening in question, arrive at the East Liberty station in time to procure a ticket before getting on the train?

"No."

"2. Did the conductor, when demanding from the plaintiff twenty-four cents fare, or before putting him off the train, inform him that he would obtain a receipt entitling him to be repaid ten cents of the fare on presentation at the proper office; or did Mr. Reese know that such was the regulation?

"No."

Judgment having been entered upon the verdict, the defendant took this appeal.[1]

Mitchell, J., the right of railroad companies to make reasonable regulations, not only as to the amounts of fares, but as to the time, place, and mode of payment, is unquestionable. This right includes the right to refuse altogether to carry without the previous procurement of a ticket. Lake Shore, &c. Ry. Co. *v.* Greenwood, 79 Pa. 373. That case arose upon a special regulation as to the carriage of passengers upon freight trains; but there is no appreciable distinction between it and a general regulation as to all passengers. Both rest on the common-law principle that requires payment or tender as an indispensable preliminary to holding a carrier liable for refusal to carry, and on the manifest and necessary convenience of business, where the

[1] The points assigned for error were: 1, refusal of the trial court to charge that the regulation was reasonable and legal; 2, charge of the court that the amount demanded was in excess of the statutory amount.

The statement of facts has been abridged and arguments of counsel omitted.—Ed.

number of passengers is liable to be large and the time for serving them short.

So, too, the authorities are uniform that companies may charge an additional or higher rate of fare to those who do not purchase tickets before entering the cars. Crocker *v.* Railroad Co., 24 Conn. 249; Swan *v.* Railroad Co., 132 Mass. 116; Hilliard *v.* Goold, 34 N. H. 241; Stephen *v.* Smith, 29 Vt. 160; State *v.* Goold, 53 Me. 279; State *v.* Chovin, 7 Iowa, 208; Du Laurans *v.* Railroad Co., 15 Minn. 49; State *v.* Hungerford, 39 Minn. 6 (34 Amer. & Eng. R. Cas. 265), and note; Chicago, &c. R. Co. *v.* Parks, 18 Ill. 460; Pullman Co. *v.* Reed, 75 Ill. 130; Railroad Co. *v.* Skillman, 39 Ohio, 451; Forsee *v.* Railroad Co., 63 Miss. 67. And it may be noted, in response to one of the most urgently pressed arguments of the defendant in error, that the reasons almost uniformly given in support of this long line of decisions include the furthering of the honest, orderly, and convenient conduct by the railroad company of its own business.

The regulation in question in the present case, is not in itself unreasonable or oppressive. In regard to the traveller, it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey, instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other passengers, and still more to the railroad company, the regulation is conducive to the rapid, orderly, and convenient despatch of the conductor's part in the collection of fares, and thus to leaving him free for the performance of his other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care.

If, therefore, the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveller of putting him to the trouble of going to an office to get his excess refunded. If the company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it; and, as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveller, its validity, upon general principles and on authority, would seem to be beyond question.

These views were conceded by the learned judge below, and are not seriously questioned by counsel here. But the decision was based upon the view that the extra ten cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the act of incorporation of the company. The language of the act is, "In the transportation of passengers no charge shall be made to exceed . . . three and one-half cents per mile for way passengers." As the distance from East Liberty station to the Union station in Pittsburgh is four and one-half miles, and the regular fare fourteen cents, it is admitted that the extra ten cents is in excess of the charter rate, if it is

a "charge for transportation" within the meaning of the act. Should it be so regarded? "Charge" is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions, one (10 *b*) is, "The price required or demanded for service rendered, or (less usually) for goods supplied;" and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted, or taken from the traveller as compensation for the service rendered, and, of course, something taken permanently, — not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fares, not of the mode of collection; the protection of the traveller from excessive demands, not interference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter.

Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair, and impartial, because it provides that as to passengers getting on the train at stations where there is no ticket office, &c., or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding check, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable, and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts in express words a necessary exception which the law would otherwise imply. So, as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike and dispense with the regulation for the time being. Necessity modifies the application of all rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgment, he cannot perform it fully.

No authorities precisely in point have been found upon either side. The cases cited by the defendant in error, from Kentucky and Ohio, are widely distinguishable, as they were cases of absolute charge beyond the charter limit, without any provision for return of the excess

to the traveller. But on well-settled principles we are of opinion that the regulation is reasonable in itself, and not in violation of the restriction in the act of incorporation. The defendant's first point should therefore have been affirmed. *Judgment reversed.*

FORSEE *v.* ALABAMA GREAT SOUTHERN RAILROAD.

SUPREME COURT OF MISSISSIPPI, 1885.

[63 *Miss.* 66.]

ABOUT nine o'clock P. M., on September 20, 1884, S. P. Forsee went to the ticket office of the Alabama Great Southern R. R. Co. at Toomsuba, for the purpose of buying a ticket and taking passage for Meridian on that company's train, which was due at Toomsuba at about half-past nine o'clock P. M. The depot was dark, no ticket agent could be seen or found, and as it was raining slightly Forsee and his companion, one Poole, left the depot, where, as they claimed, there was no adequate shelter, and went over to a store near by, but from which they could still view the depot and watch for the train. No one was seen about the depot until the train approached, when a man with a mail bag ran out. Forsee seized him and said to him that he had tried to get a ticket but had not been able to find any one at the depot. The man, who proved to be the agent, replied that it was then too late. Forsee went to the conductor and told him that he had been unable to buy a ticket because the agent was not on hand. Forsee then boarded the train, and when the conductor came to him for his fare again told him he had no ticket and why he had failed to get one, but tendered him thirty-five cents, the amount of the regular ticket rate between Toomsuba and Meridian. The conductor declined to receive it, and demanded fifty cents, explaining to Forsee that his instructions were positive to collect fifty cents from passengers going from one to the other point mentioned who failed to purchase tickets. Forsee still refused to pay more, when the conductor stopped the train, seized Forsee, and with the assistance of two train men was about to put him off. Forsee, rather than be put off, paid fifty cents under protest, and afterward brought this action to recover damages for the alleged injury that resulted to him from the neglect and wrongful conduct of the railroad company's agents.

Plaintiff introduced evidence tending to show that the conductor acted in a rough, insulting, and insolent manner, while the defence introduced evidence tending to show the opposite, and that the conductor used no more force than was necessary.

Plaintiff offered to prove by witnesses and by the deposition of one C. P. Blanks that the acting ticket agent was a boy of sixteen years,

that he was careless and indifferent, and that he had been previously reported to defendant for neglecting his duties. This evidence the court below refused to admit.

Plaintiff further offered to prove by two witnesses that he was at the time in a delicate state of health, and that he would have probably received serious and permanent injuries had he been put off the train, and that owing to the delicate state of his health, any undue excitement of mind was injurious, but the court below refused to admit such testimony.

Plaintiff also offered to prove that on the day following his attempt to purchase the ticket, the ticket agent had admitted to some third person that he was asleep before and on the arrival of the train on the day in question, and that the depot was not lighted; and this evidence the court below refused to admit. The jury rendered a verdict for plaintiff, and fixed his damages at fifty dollars, and thereupon the court adjudged that each party pay his own costs. The plaintiff appealed.

ARNOLD, J. There was no error in sustaining the objection to the proposed testimony in regard to appellant's health. It is not claimed that his health was affected by the occurrence of which he complains, and evidence on that subject was irrelevant.

The testimony offered, including the deposition of C. P. Blanks in regard to the character of the ticket agent, was properly excluded. It was shown that the agent was not at his post, and that the ticket office was not open in time for appellant to obtain a ticket, and the character of the agent under these circumstances was immaterial.

The alleged admissions or declarations of the ticket agent, made a day or more after the occurrence to which they related, were incompetent, and the objection to the testimony introduced to prove such admissions or declarations was well taken. Moore *v.* Chicago, &c., Railroad Co., 59 Miss. 243.

It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may, in the exercise of this right, make discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes, and inconvenience incident to collecting fare and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. State *v.* Goold, 53 Maine, 279; The

Jeffersonville Railroad Co. *v.* Rogers, 28 Ind. 1; Swan *v.* Manchester, &c. Railroad Co., 132 Mass. 116.

But such a regulation is invalid, and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 Redfield on Railways, 104; Evans *v.* M. & C. Railroad Co., 56 Ala. 246; St. Louis, &c. Railroad Co. *v.* Dalby, 19 Ill. 353; St. Louis, &c. Railroad Co. *v.* South, 43 Ill. 176; Smith *v.* Pittsburg, &c. Railroad Co., 23 Ohio St. 10; Porter *v.* N. Y. Central Railroad Co., 34 Barb. 353; The Jeffersonville Railroad Co. *v.* Rogers, 28 Ind. 1; The Jefferson Railroad Co. *v.* Rogers, 38 Ind. 116; State *v.* Goold, 53 Maine, 279; Swan *v.* Manchester, &c. Railroad Co., 132 Mass. 116; Du Laurans *v.* St. Paul, &c. Railroad Co., 19 Minn. 49.

In such case exemplary damages would not be recoverable, unless the expulsion or attempted expulsion was characterized by malice, recklessness, rudeness, or wilful wrong on the part of the agents or servants of the corporation. Chicago, &c. Railroad Co. *v.* Scurr, 59 Miss. 456; Du Laurans *v.* St. Paul, &c. Railroad Co., 19 Minn. 49; Pullman, &c. *v.* Reed, 75 Ill. 125; Hamilton *v.* Third Avenue Railroad Co., 53 N. Y. 25; Townsend *v.* N. Y. Central Railroad Co., 56 N. Y. 295; Paine *v.* C. R. I. & P. Railroad Co., 45 Iowa, 569; McKinley *v.* The C. & N. W. Railroad Co., 44 Iowa, 314.

The cause was tried in the court below on theories and principles of law different from those here expressed, and the judgment is reversed and a new trial awarded.

Reversed.[1]

[1] *Compare:* Central Co. *v.* Strickland, 90 Ga. 562; Ill. Co. *v.* Johnson, 67 Ill. 312; Sage *v.* Evansville Co., 134 Ind. 100; Haufbauer *v.* R. R., 52 Ia. 342; Pacific R. R. *v.* Wolf, 54 Kans. 592; Mesey *v.* R. R., 83 Ky. 511; McGowen *v.* S. S. Co., 41 La. Ann. 732; State *v.* Gould, 53 Me. 279; Zagelmeyer *v.* R. R., 102 Mich. 214; Du Laurans *v.* R. R., 15 Minn. 102; Hilliard *v.* Gould, 34 N. H. 230; Porter *v.* R. R., 34 Barb. 353; Fordyce *v.* Manuel, 82 Tex. 527. — Ed.

WESTERN UNION TELEGRAPH CO. *v.* McGUIRE.

SUPREME COURT OF INDIANA, 1885.

[104 *Ind.* 130.]

ELLIOTT, J. The complaint seeks a recovery of the statutory penalty for a failure to transmit a telegraphic message. The answer of the appellant is substantially as follows: "The defendant says that it did fail and refuse to transmit the message set forth in the complaint, but defendant says that the plaintiff was a stranger in Frankfort and a transient person therein; that the said message was one that required an answer; that the defendant has, and had at the time, as one of its general rules and regulations of business, regularly adopted for the government of the operators and agents of said company, the following rule: 'Transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words. In such case the signal, "33" will be sent with the message, signifying that the answer is prepaid;' that the defendant's agent to whom said message was offered, informed the plaintiff of the existence of said rule and what said rule was, and that the amount required to be deposited was twenty-five cents; that thereupon the plaintiff refused to comply with said rule and make said deposit."

To this answer a demurrer was sustained, and on this ruling arises the controlling question in the case.

One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph corporations should not possess this general power; nor is there any doubt under the authorities that this power resides in them. Western Union Tel. Co. *v.* Jones, 95 Ind. 228 (48 Am. R. 713), *vide* opinion, p. 231, and authorities cited; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429 (9 Am. R. 744); True *v.* International Tel. Co., 60 Maine, 9 (11 Am. R. 156); Scott & J. Law of Telegraphs, section 104.

Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. Western Union Tel. Co. *v.* Jones, *supra;* Western Union Tel. Co. *v.* Buchanan, *supra;* Western Union Tel. Co. *v.* Adams, 87 Ind. 598 (44 Am. R. 776); Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299 (45 Am. R. 480, see authorities note, pages 491, 492).

It is for the courts to determine whether a by-law is or is not an unreasonable one, and this is the question which now faces us. 1 Dillon Munic. Corp. (3d ed.), section 327; Scott & J. Law of Telegraphs, section 104.

We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable, or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message.

We have found no case exactly in point, but we have found many analogous cases which, in principle, sustain the by-law before us. Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Camp *v.* Western Union Tel. Co., 1 Met. Ky. 164; Vedder *v.* Fellows, 20 N. Y. 126; Ellis *v.* Am. Tel. Co., 13 Allen, 226; McAndrew *v.* Electric Tel. Co., 33 Eng. L. & Eq. 180; Western Union Tel. Co. *v.* Blanchard, *supra*, see authorities cited note, 45 Am. R., page 489; Western Union Tel. Co. *v.* Jones, *supra*.

Judgment reversed, with instructions to overrule the demurrer to the answer and to proceed in accordance with this opinion.

OWENSBORO GASLIGHT CO. *v.* HILDEBRAND.

COURT OF APPEALS OF KENTUCKY, 1897.

[42 *S. W. Rep.* 351.]

HAZELRIGG, J. The Owensboro Gaslight Company and the Owensboro Electric Company are not given, in express terms, exclusive right to manufacture and furnish gas in the city of Owensboro, but the companies are given the use of the streets and public ways of the city for the purpose of laying the mains and pipes and other appliances in the maintenance of its work. The companies may also acquire the use of lands for their business by writs *ad quod damnum*. Their business, therefore, is affected with public interest, and they are quasi-public corporations, and practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices, or impose different terms and conditions, according to their caprice or whim. They

may, however, fix reasonable rules and regulations applicable to all the consumers alike. In these cases the companies undertook to compel the appellee to deposit the sum of twenty dollars as security for his future consumption of gas and electricity, and upon his refusal to do so, withdrew their pipes and wires from his building. This suit by appellee was to compel them to furnish him light, and the court, on final hearing, granted the relief sought. It is conceded by appellee that appellant may prescribe reasonable rules and regulations, and impose reasonable conditions upon the consumer, and require proper security for the payment of their bills, and may even require deposits in advance; but his contention here is that the companies have adopted no such rule or regulations as they have attempted to enforce against him, and such appears to us to be a fact. No rule or regulation of a general character is relied on or exhibited by the companies, and to allow them to select this or that consumer against whom to enforce special rules would put the consumer at the capricious humor of the agents and employees of the companies.

The judgment below is affirmed.

STATE EX REL. WEISE *v.* THE SEDALIA GAS LIGHT CO.

COURT OF APPEALS, MISSOURI, 1889.

[34 *Mo. App.* 501.[1]]

STATEMENT of the case by the court.

The petition avers, and the alternative writ recites, that the appellant was organized under the general laws of the State of Missouri for the purpose of supplying the city of Sedalia and its inhabitants with illuminating gas; that by section 14 of said article 7 (Wag. Stat.) said company might lay its pipes, &c., through the streets of said city, by consent of the municipal authorities thereof, under such reasonable regulations as said authorities might prescribe; that on the seventeenth day of June, 1868, an ordinance was passed by the municipal authorities of said city granting to said company the exclusive right to lay its pipes through said city, and to supply it and its inhabitants with gas, for a period of thirty years, upon the sole condition, however, that said company should furnish the city and its inhabitants "a good article of illuminating gas, at a price per cubic foot, not exceeding the rate charged in similarly situated places;" that said company accepted the terms of said ordinance; that the relator complied with all the reasonable rules and regulations of said gas company, which are fully set forth in the petition and alternative writ; that notwithstanding all this, and relator's offer and tender of full pay for all gas con-

[1] This case is abridged. — ED.

sumed, the gas company removed the meter from his place of business and refused to furnish him gas, &c.

All this is admitted in respondent's return to the alternative writ, and the sole justification pleaded, for its refusal to furnish gas to relator, is that, in addition to the rules and regulations set out in the petition and alternative writ, said gas company had adopted another to the effect that, "all persons using or desiring to use gas manufactured by the defendant within said city, should pay a monthly rental upon, and for the use of, the meter furnished by the defendant of the sum of one dollar and twenty-five cents per month, in all cases where such consumer consumes less than five hundred feet of gas, and which rental was to be taken in full of such gas, not exceeding the amount of five hundred feet in any one month." Thereupon relator moved to strike out that part of the return for the following reasons:

I. The rule, regulation or by-law, in said portion of said return set up and pleaded as a reason why a peremptory *mandamus* should not issue against defendant herein, is not a fair, impartial nor reasonable rule or by-law; it is oppressive and discriminatory and contrary to public policy; it is beyond the power of the defendant to make and seeks to enlarge the powers of defendant, granted it by the laws of the State; it is in conflict with the ordinance of the city of Sedalia, as set forth in the alternative writ, under which it supplies the city of Sedalia and its inhabitants with illuminating gas.

II. Said portion of said return states no facts which in law constitute good cause why the defendant should not obey the mandate of the alternative writ issued herein.

This motion was sustained. The respondent refused to plead further, and the return, after this portion being stricken out, being in effect a concession of the recitations of the alternative writ, a peremptory writ was ordered.

The sole ground of error is the action of the court in striking out said portion of respondent's return.

Gill, J. I. It is a well-understood principle that corporations, so engaged as the appellant gas company, may, in its dealings with the people, adopt and enforce such reasonable and just rules and regulations as may be necessary to protect its interests and further the designs of its incorporation. They have such power, too, without an express grant to that effect. It is an inherent power implied from the nature of the business in which they are engaged, limited only by express statute, or ordinance, or by a sense of what is right, reasonable, and just. Shepard *v.* Gas Co., 6 Wis. 539; Wendall *v.* State, 62 Wis. 300.

The relator in this action contends, however, that the rule, or regulation, of the Sedalia Gas Company prescribing payment by the consumer of $1.25 per month, where the amount of gas used is less per month than five hundred cubic feet — the designated $1.25 per month being denominated rent of meter — is "unjust, unreasonable, and dis-

criminatory." What is just and reasonable is to be determined by the nature of the employment pursued by the corporation and the uses and conveniences of the public. There must be a reasonable protection of the interests of the one, consistent with the reciprocal rights of the other.

Irrespective, now, of any ordinance provision, can it be said that this charge of $1.25 per month on a consumer of less than five hundred cubic feet of gas is unreasonable? We think it is not unjust or unreasonable. The evident purpose of this rule was to exact fair compensation from those requiring gas connection, and gas furnished at hand, though the amount consumed should be very small, almost nominal.

It is a matter of common knowledge, that to furnish the gas at hand for the very small or nominal consumer requires the same out-lay, in the way of a meter, periodical inspection and repairs, with weekly or monthly visitations, that is required of very large consumers. The same investment and the same care and oversight is required where the gas monthly consumed shall not exceed ten cubic feet or even one cubic foot, as where the amount used may be ten thousand cubic feet. At the rate charged then in Sedalia, as alleged in relator's complaint, the gas company would be required to invest and expend, for the benefit of this merely nominal consumer, more dollars than cents received. The rate there charged, as alleged, is $2.50 per thousand cubic feet. For this ten cubic feet thus consumed, and for which the company could receive pay of only two and a half cents, the cost to the gas company may be many dollars.

II. Relator's further contention is that the gas company has no authority, under the ordinance of the city, under which it operates, to adopt or enforce the rule in question.

Much courage for this contention is apparently drawn from the terms of the grant of franchise, by the city, wherein it is provided that the grant should be "upon condition that it (the gas company) should furnish the public lamps of the city, and to the inhabitants of the city . . . gas at a price, per cubic foot, not exceeding the rate charged in similarly situated places; that said gas company should have the right to collect pay for gas furnished from the consumers of the same," &c.

It is insisted that this is not collecting for "gas consumed," but is charging rental on the meter used in measuring the gas, and that the company is only allowed to charge for gas per cubic foot.

The construction insisted on is too narrow. While the rule names the charge for gas in this instance as "rent" of meter, yet by its express terms the $1.25 is pay for all gas consumed by the customer, to the extent of five hundred cubic feet. And again the clause limiting the maximum price at which the company should sell its gas to the city for street lamps and to its citizens was only intended to require of the company to furnish gas to Sedalia, and to its inhabitants, at prices not exceeding those prevailing in other "places similarly situated." It

was not meant to prohibit the gas company from selling gas by any other means than per cubic foot. If the company shall furnish gas to the city, and to its inhabitants, at prices not in excess of those charged in "places similarly situated," than the spirit of this ordinance provision is fully met; and if the gas company by this rule is charging more than is imposed in "places similarly situated," then the provisions of the ordinance in question are being violated, and the company will not be protected in so doing. We think this is a fair construction to be given the clause in question. To hold otherwise would impose upon the gas company the necessity to affix a meter on every lamp post in the city, and measure off each cubic foot furnished the city; for the same stipulation implies to gas furnished the street lamps as is furnished private consumers.

We hold then that the rule or regulation in question, and as is stated in the return to the writ, is not, as a matter of law, unreasonable, and does not conflict with the terms of the franchise ordinance referred to, and, admitting the truth of that portion of the return as pleaded, the trial court, in our opinion, committed error in striking out the same, as it was proper matter of defence to the action.

Judgment reversed and cause remanded.

The other judges concur.

WATAUGA WATER CO. *v.* WOLFE.

SUPREME COURT OF TENNESSEE, 1897.

[99 *Tenn.* 429.]

CALDWELL, J. C. H. Wolfe brought this suit against the Watauga Water Company and obtained judgment before the circuit judge, sitting without a jury, for ten dollars, as damages for its refusal to furnish him water at his residence in Johnson City. The company appealed in error.

The defendant is a water company, chartered under the general laws of the State (Code, annotated by Shannon, §§ 2499–2506), with the right of eminent domain and all essential powers, privileges, and franchises, and operating its waterworks at Johnson City under special contract with that city to furnish it and its inhabitants with water at designated rates. Being thus endowed by the State, and under contract with one of the State's municipalities, the company is essentially a public corporation, in contradistinction from a private corporation. It is engaged in a public business, under a public grant and contract, and is, therefore, charged with public duties, and cannot, at its election and without good reason, serve one member of the community and not another. It is bound to furnish the commodity, which it was created to supply, to the city and all of its inhabitants upon the terms desig-

nated in its contract (the same being fair and reasonable), and without discrimination. Crumley *v.* Watauga Water Co., 98 Tenn. 420; Hangen *v.* Albina Light & Water Co. (Ore.), 14 L. R. A. 424; American Waterworks Co. *v.* State (Neb.), 30 L. R. A. 447; State *v.* Butte City Water Co. (Mont.), 32 L. R. A. 697; Union Tel. Co. *v.* State, 118 Ind. 206; Lombard *v.* Stearns, 4 Cush. 60; Lowell *v.* Boston, 111 Mass. 464; Williams *v.* Mut. Gas Co., 52 Mich. 499; 50 Am. Rep. 266; Olmsted *v.* Morris Aqueduct Proprs., 47 N. J. Law, 333; Shepard *v.* Milwaukee Gas Co., 6 Wis. 539; 70 Am. Dec. 479; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; 2 Mor. on Pri. Corp., Sec. 1129; 2 Cook on S. S. & C. L., Sec. 932; 1 Dill. on Mun. Corp. (4th ed.), Sec. 52, and note, citing Forster *v.* Fowler, 60 Pa. St. 27; 29 Am. & Eng. Enc. L. 19, note; 15 L. R. A. 322.

Though impressed with a public use, and under legal obligation to furnish water to all inhabitants at the designated rates, and without discrimination, the defendant company is allowed to adopt reasonable rules for the conduct of its business and operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company, even to the extent of denying water to those who refuse to comply with them. American Waterworks Co. *v.* State (Neb.), 30 L. R. A. 447.

Wolfe had been a patron of the company, and had been accustomed to leave his hydrant open, so that large quantities of the escaping water went to waste. His claim was, that the water so wasted was stale and not fit for his use, and upon that ground he sought to justify his action; but the company thought the water not stale and the waste excessive. Complaints were made to the company by persons upon whose premises the escaping water flowed.

Wolfe ceased to take water from the company for awhile, preferring to use his well. When he applied to the company for water again, tendering all required charges in advance he was requested to sign a regular application, and agree, in conformity to a rule of the company, that he would keep his hydrant closed except when using the water. This he declined to do, and the company refused to turn water into his hydrant. He said he "wanted pure, good water," and that he "would keep the tube open so long as it was necessary to keep the water fresh." Three days after the company's declination this suit was brought to recover damages. The rule in question was reasonable, and Wolfe's refusal to comply with it disentitled him to receive the water, and relieved the company of its obligation to furnish it. This does not imply that a patron of a water company is not entitled to "pure, good water," but only means that he may not set himself up as the sole judge of its quality, and execute his own adverse judgment in his own way, and without restraint, in defiance of the company, and to its inevitable detriment. It has been held, that "a rule of a water

company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable" (Shiras *v.* Ewing, 48 Kan. 170); and that holding was approved in the case of American Waterworks Co. *v.* State, 30 L. R. A. 449.

Reversed, and enter judgment dismissing suit with costs.

HARBISON *v.* KNOXVILLE WATER CO.

COURT OF CHANCERY APPEALS OF TENNESSEE, 1899.

[53 *S. W. Rep.* 993.]

THIS bill was filed February, 1899, to enjoin the defendant from cutting off the water supply for domestic purposes from the premises occupied by complainant, and to secure a mandatory injunction commanding defendant to furnish complainant water for the purpose stated, without requiring him to comply with certain of its rules and regulations, characterized in the bill as oppressive and unreasonable. The bill, after stating the location of the premises occupied by complainant, and that the defendant was a corporation organized under the laws of this State for the purpose of supplying water to the city of Knoxville and its inhabitants, avers that, having been given the rights to lay its pipes, &c., in the streets and alleys of the city of Knoxville, it is a public corporation, and engaged in a public business. The bill further avers that complainant, soon after he occupied the premises described, commenced taking water from the defendant for domestic purposes, and continued to get water from it until May, 1899, paying in advance therefor, under the rules of the company; that the hydrant or pipe from which complainant obtained his supply of water was located in his yard, adjacent to his house, and that in May, 1898, he, at his own expense, had a faucet put upon his hydrant, and began to use water for sprinkling his yard and the street adjacent thereto; that for water thus used he paid the additional charges exacted by the company, and continued to use water for both domestic and sprinkling purposes until January 1, 1899; that at this date he called at the office of the company in Knoxville, and informed its officers that he did not desire to take water for sprinkling purposes, but did desire to take water for domestic purposes, and offered then to pay its charges for water to be thus used; that his reason for not wishing the water for sprinkling purposes was that during the winter and spring seasons nature's rains furnished the water free of charge, and he had no need of an artificial supply for sprinkling purposes. . . . The bill further states that the defendant, February 1, 1899, cut off his domestic supply of water altogether from his premises, because he would not pay its unjust charges in advance. It is alleged that complainant's sole reliance

for water is upon the defendant, and that, if it is allowed to cut off the supply, he will be put to great cost, expense, and annoyance in providing himself with the water necessary for cooking, washing, and other domestic purposes. It is said in the bill that complainant is now compelled, in order to supply himself with water for domestic purposes, to get the same from his neighbor's cistern, across the street from him. The charges of the defendant for water for domestic purposes are tendered with the bill. The complainant, however, denies the right of the defendant to cut off his water supply because its charges therefor were not paid in advance. He also denies the right of the defendant company to exact from its patrons, as a condition precedent to furnishing them with water, its price or charges for said water for three months in advance, or for any other period in advance. The rules and regulations of the company in this regard are assailed as unjust, oppressive, and unreasonable. The prayer of the bill is for an injunction compelling defendant to abstain from cutting off the water supply of complainant for domestic purposes, and for a mandatory injunction compelling defendant to furnish complainant water. A decree is also asked establishing and declaring complainant's rights in the premises, under the facts, and especially for a decree compelling the defendant to furnish complainant water for domestic purposes without requiring him to injure, remove, or destroy the pipe or faucet placed by him upon his hydrant, and without requiring him to take and pay for the water for the entire season as fixed by defendant, and without requiring him to pay in advance therefor. The rules of the company exacting these requirements are asked to be set aside, as unreasonable and oppressive, and as beyond the power of defendant to establish. An injunction issued under the prayer of this bill.

The defendant water company answered the bill in full.

Chancellor Kyle heard the case upon the whole record August 3, 1899. He held that the complainant was not entitled to the relief sought in his bill, nor to any relief, and thereupon dismissed the bill, with costs. The defendant thereupon moved the court for a reference to the master to ascertain and report the damages due the defendant, sustained by reason of the injunction sued out. The court, however, was of opinion that this reference should not be executed until after the hearing of the appeal prayed by the complainant. The complainant prayed and was granted an appeal to the Supreme Court, and has assigned errors. The errors assigned are: First. Error in dismissing the bill of complainant and in denying him relief. Second. Error in the chancellor in refusing to decree that the defendant could not, as a condition precedent to furnishing the complainant water for domestic purposes only, require him to remove or cut off the threads from the nozzle of his hydrant. Third. Error in not holding that the defendant had no right, as a condition precedent to furnishing water for domestic purposes, to require him to pay for water for both domestic and sprinkling purposes in advance. Fourth. Error in not holding that the defendant had no

right, as a condition precedent to furnishing complainant water for sprinkling purposes, to require him to take and to pay for the same for an entire season, extending from April to November of each season. Fifth. Error in not holding that defendant's rules, under and by virtue of which it assumed the right to do the things above complained of, were unjust, oppressive, harsh, unreasonable, and illegal.[1]

Wilson, J. The law is well settled that water companies organized and invested with the powers given the defendant company, and obligated to furnish cities and their inhabitants with water, are in the nature of public corporations, engaged in a public business, and are charged with the public duty of furnishing to the cities and their inhabitants water, alike, and without discrimination and without denial, except for ground, and upon sufficient cause. It is equally well settled that such companies, while thus charged and obligated, may adopt reasonable rules for the conduct of their business and the operation of their plants, and such rules are binding on their patrons, and may be enforced, even to the extent of denying water to those who refuse to comply with them. In support of these propositions, we need only refer to the cases of Crumley *v.* Water Co., 99 Tenn. 420, 41 S. W. 1058 *et seq.*, and Water Co. *v.* Wolfe, 99 Tenn. 429, 41 S. W. 1060 *et seq.* and the opinions therein prepared by Mr. Justice Caldwell, where numerous authorities are referred to and commented on. In these cases the rule is announced that a water company cannot refuse to furnish water, upon the tender of its charges therefor, on the ground that the applicant is indebted to it for a previous supply of water, which he refuses or is unable to pay for. It is further announced in the latter of the cases that a regulation of the company requiring patrons to keep their hydrants closed, except when using the water, is reasonable, and that a refusal to comply with this rule of the company justifies it in refusing to supply water to the party so refusing, although under legal obligation to do so upon his compliance with its reasonable regulations. The question, therefore, in every case of this character, is the reasonableness or unreasonableness of the rule assailed by the citizen asking for a supply of water, and invoked by the company in justification of its refusal to furnish it. The rules of the company assailed in this case are, in brief: (1) That the citizens shall pay in advance for a quarter of a year for a supply of water for domestic purposes; (2) that, if the citizen take water for sprinkling purposes, he must do so for the season in each year fixed by the company (that is, from April 1st to November 1st), and pay for the same in advance; (3) that the company will not furnish water for domestic purposes, although its charges therefor for the quarter are tendered in advance, unless the applicant also takes water for sprinkling purposes, if the application come in the sprinkling season fixed by it, or unless the applicant removes the appliances of his hydrant, or puts it in such con-

[1] This statement of facts is taken from the statement of Wilson, J. — Ed.

dition that he cannot use it to get water for sprinkling purposes. In Tacoma Hotel Co. *v.* Tacoma Light & Water Co., 3 Wash. 797, 28 Pac. 516, 14 L. R. A. 669, a rule requiring a deposit of money to guarantee the payment of the price of gas used, and authorizing the company to discontinue furnishing gas unless the rule was complied with, was held to be reasonable. In Shiras *v.* Ewing, 48 Kan. 170, 29 Pac. 320, a rule of the water company to shut off the supply of a patron who wastes it was upheld as reasonable. In People *v.* Manhattan Gaslight Co., 45 Barb. 136, the rule of the gas company giving it the right to refuse to furnish a customer with gas until he paid his past-due gas bills was held not unreasonable. The holding of the case last cited, we take it, is in conflict with the rule announced in Crumley *v.* Water Co., *supra*. The above principle announced in the New York case is also repudiated in the case of Gaslight Co. *v.* Colliday, 25 Md. 1. See, also, Lloyd *v.* Gaslight Co., 1 Mackey, 331. The case of Shepard *v.* Gaslight Co., 6 Wis. 539, and extended note thereto, give a full and clear statement of the law applicable to the duties and powers of gas companies, whose relations to the public are closely analogous to water companies chartered to supply cities and their inhabitants with water. In this case it was held that the gas company had the right to make such needful rules and regulations for its own convenience and security, and for the safety of the public, as are just and reasonable, and to exact from the consumer of its product a promise of conformity thereto. Under this general principle, it was held that the company had the right to demand security for the gas consumed, or a deposit of money to secure payment therefor. A rule of the company, however, requiring the citizen to agree to free access to his house and premises at all times by the inspector of the company for the purpose of examining the gas appliances, and to remove the meter and service pipe, was held to be too general in its scope, and therefore unreasonable and beyond the power of the company to enforce. A rule of the company reserving to it the right at any time to cut off the communication of the service whenever it found it necessary or deemed it necessary to do so, to protect its works against abuse or fraud, was also held to be unreasonable. In this connection the court said that the company must rely for protection against fraud upon the same tribunals that the law provides for individuals. It was further adjudged in the case that the company had no power to impose a penalty for the violation of one of its regulations, and that it had no right to make submission to such penalty a condition precedent to the right of the citizen to be furnished with gas. See, also, the following additional cases for further illustration of the general rule, and its application to particular instances: American Water Works Co. *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; Williams *v.* Gas Co., 52 Mich. 499, 18 N. W. 236; State *v.* Nebraska Tel. Co., 17 Neb. 126, 22 N. W. 237; City of Rushville *v.* Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, note, and cases cited; Water Co. *v.* Adams, 84 Me. 472, 24

Atl. 840, and cases cited. In the case last referred to it was ruled that a regulation of the water company, that one year's rent would be required in all cases, payable in advance, on the 1st day of July each year, was unreasonable and could not be enforced, and therefore a year's rent could not be collected from a party who had used water only for a few months. It was further ruled in that case that a contract to pay for water according to the regulations of the company would not be implied from a knowledge of such regulations, if they were unreasonable.

A review of these and other authorities shows, we think, that the regulation of the defendant company requiring a prepayment of a quarter's rent for a water supply for domestic purposes is reasonable. We are not dealing with a case where the residence of the consumer is metered, and the exact quantity used by him can be measured. In such case the party pays for the water actually consumed by him, at the scale of prices fixed by the company, assuming its charges to be reasonable. In the case at bar the complainant gets his water from a hydrant in his yard, connected with the service pipe of the company, and the rule of the company fixes the quarter rent. Paying this rent, he is limited to the consumption of no definite quantity of water. The only limitation upon his use of it, so far as we gather from the record, is an implied one, that he must not waste it; and, if he does waste it, the company, under the authorities cited, can cut off the supply. But, in a controversy over this, the courts, we take it, are the tribunals to ultimately settle it, and not the company. The rule or requirement of the company that the party taking and paying for water for domestic purposes only must put his hydrant appliances in condition for such use only, and not have it in a condition to use water through and from them for sprinkling purposes, unless he pays a reasonable rental for the use for the latter purpose, is, we think, reasonable, and one that the company can enforce. Such a regulation for the sale of its water furnished through hydrants, where the quantity used cannot be or is not measured, is essential to protect the rights and safety of the company, and may be necessary to enable it to meet its obligations to the public, and its duty to furnish water to all inhabitants of the city alike and without discrimination. In determining the reasonableness or unreasonableness of a rule adopted by a water company chartered to supply a city and its people with water, we must necessarily take into consideration its relation to the city, and its compacted population, and the various elements composing such a population. It has no right to base a rule on the theory that the population, as a whole, is dishonest. But it has the right to adopt a rule which, while giving the honest citizen what he pays for, will prevent the dishonest from getting what he never paid for, and never intended to pay for, and said he never wanted. It may be doubted whether the company has the right to make an arbitrary rule requiring the citizen to pay for water taken through his hydrant for sprinkling purposes for seven months in the year, when he does

not want it and does not need it for that purpose for that length of time. As we understand the relation of the complainant to the company in respect to this point, under the facts averred in his bill, this question is not necessarily in the case. If, when he wants water for sprinkling purposes, he will put his water appliances in condition for its use for this purpose, and apply to the company for water for this purpose for a less period of time than for the whole sprinkling season fixed by the company, tendering it a reasonable price for the water thus demanded, he will raise and present the question of the reasonableness or unreasonableness of the rule of the company on this matter assailed by the bill. As we have held, it was the duty of complainant to put his hydrant and its appliances in a condition to get water alone for domestic purposes, when he wanted it only for that purpose. Failing to put them in condition to use water alone for domestic purposes while he wanted water for this purpose alone, he had no right to demand that the company furnish him water for domestic purposes and agree to furnish him water for sprinkling purposes at some indefinite time in the future, and for an indefinite period thereafter, as he might call for it or need it. Such a demand, it seems to us, ignores the reciprocal relations and duties existing between city water companies and the inhabitants of the cities they are organized to supply with water. There is no error in the decree of the chancellor, and it is affirmed, with costs.

The other judges concur.

BROWN *v.* WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF THE TERRITORY OF UTAH, 1889.

[6 *Utah*, 219.]

JUDD, J. This is an action brought by the plaintiff against the defendant in the District Court at Ogden City. The facts of the case show that on the 8th of April, 1888, between 5 and 6 o'clock in the evening, the plaintiff, a girl about five years old, had her hand badly mashed, and to such an extent that her forefinger of the right hand was broken at the middle joint. It seems that she, together with other children, were engaged playing upon the turn-table of the railroad at a station called Promontory, in Box Elder County, Utah Territory, about 50 miles north of Ogden City. That when her father discovered her injury, — there being no physician that could be reached nearer than Ogden City, — he at once telegraphed to that city for a physician. To this telegram he received an answer that the physician could not come. Immediately upon the receipt of the telegram from the physician he sent the following: "Promontory, April 8th, 1888. To J. R. Brown, Ogden, Utah. — Send doctor on first train. Katy has broken her finger. T. G.

Brown." This telegram was received by the agent of the defendant at Promontory, who was likewise the agent of the railroad, at 6.30 o'clock, Promontory time, — 7.50 Ogden time. Trains left Ogden, going west, one at 7 P. M., and one at 11.30 at night. This despatch was not delivered by the company to Brown until 7.35 A. M. the next day. The testimony sufficiently shows that if the despatch had been delivered to Brown at Ogden, that he would have procured a physician to go to Promontory, who would have left on the 11.30 train, and arrived at Promontory at 2 o'clock. As it was no physician reached the plaintiff that night, and the next morning her father took her upon the train, and arrived at Ogden at 10 o'clock on the morning of the 9th. When the father arrived at Ogden he at once took her to the office of a physician and surgeon by the name of Bryant, who found, as he states, that the fore part of the finger, from where it was broken, was, to use his own language, "dead;" that by twisting the finger around, or by some other means not entirely described, the circulation had been strangled; and that he found it in such a condition that it was impossible to re-establish circulation, and that amputation was necessary, and he amputated it at the middle joint. The action of the plaintiff against the defendant is founded upon the idea that if the despatch sent to Brown had been delivered in proper time a physician would have arrived at Promontory at the hour of 2 o'clock that night after the accident, and that the finger, by proper surgical treatment, could have been saved, and the plaintiff saved of much pain and suffering. This theory of the case is put in issue by the defence and the ground taken is, *first*, that the proof does not show that the final amputation of the finger was the result of any delay in procuring a physician, and that it was probably the result of the accident which so badly damaged the finger; and that in any event amputation would have been necessary, and that the delay and negligence, if any, of the defendant, was not the proximate cause of the loss of the finger, and the pain and suffering; and therefore the defendant alleges that it is not liable; and for further defence it sets up that the manager of the defendant company in charge of the office in Ogden had established certain rules with reference to the delivery of despatches from that office, and that those rules were reasonable, and that, all other questions aside, it is not liable. It alleges and shows by the proof that, the day of the reception of this despatch at Promontory and its transmission to Ogden City being Sunday, its office hours were from 8 to 10 o'clock A. M. and 4 to 6 P. M., and that on week-days from 7.30 A. M. to 8 P. M. That this despatch, being received at Ogden at 8 o'clock and 9 minutes, was more than two hours after the office hours established for this office, and, to use the language of the brief of the counsel for the defendant, "these hours being reasonable, the company was not bound to deliver the despatch received outside of the hours, no matter what the consequences may have been."

So far as the first point of the defence is concerned, — that is, "that

the proof does not sufficiently show that the result to the plaintiff would have been different had the despatch been delivered," — this court is content to observe that all those matters were submitted fairly, and under proper instructions by the trial judge to the jury, and, the jury having found against the defendant, the rule of this court is that it will not disturb the verdict of a jury where the evidence tends to support it, and under that rule this case falls. But the more important question arises on the ground as to the right of the defendant to establish rules for its guidance in the delivery of telegrams. It will be remembered that this telegram was received at Promontory, and the money paid for its transmission to the Ogden office, and that it was transmitted in due time to the last-named office; and the only complaint, when the case is stripped of verbiage, is that the defendant company were guilty of negligence in failing to deliver this telegram when it reached Ogden City from that office to Brown, the person to whom it was sent; and the direct defence of the defendant is that it was received after its office hours, which it had the right to establish, and that therefore there was no negligence. In other words, the defendant says "that we have the right to establish hours for the transmission and delivery of despatches, and we have the right to judge of the reasonableness of those hours, and that, so long as we are within the observance of the rules and hours which we have established, we are guilty of no negligence;" the argument being that the public is bound to take notice of the hours and rules that "we have established for business." Can this contention be sanctioned, is the important question which arises in this case. Whether, if a telegram were tendered the company to be sent by them out of their office hours, they would be bound to receive and send it, is a question with which the court is not now dealing, and upon which it expresses no opinion; but we are of the opinion that, having received and transmitted this despatch, the measure of diligence to be applied to the conduct of the defendant, with reference to its delivery, is not to be, and cannot be, decided by any rules or hours that the company may see fit to establish. Whether in the individual case the rules of the company are or are not reasonable, or whether it is or is not guilty of negligence in failing to deliver a message, is a question which the court will not allow the company to decide. It is a fundamental rule in the administration of remedial justice that courts claim and exercise for themselves the right to adjudge in each individual case as it may be presented the question of whether the parties sued are or are not guilty of wrong, with reference to the particular transactions under investigation. Whether the rules established by the defendant are reasonable or not, as we have said, is a question to be decided by the court or jury, as the case may be, in each individual case as it arises. It will not do to say that, because the company has the right to establish rules for its government, therefore those rules determine the question of negligence or no negligence. It must be remembered that this defendant, in offering its services to the public,

and receiving the money of people for sending despatches from one point to another, is, to say the least of it, occupying the position of a public institution. In the language of Chief Justice Waite, in the case of Munn *v.* Illinois, 94 U. S. 113: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use." This defendant company, by its invitation to the public to use its lines for the transmission of messages, impliedly grants to the public an interest in the use of its wires, and, having done this, like all other institutions of like character, its rules and regulations are at all times open to inquiry as to their reasonableness, and its conduct is at all times open to inquiry, as to whether it is guilty of negligence or not. We are of the opinion that the question in this case of the reasonableness of these rules of the company was properly submitted to the jury; and we are also of the opinion that the question of whether this company was guilty of negligence in failing to deliver the despatch was properly submitted to the jury; and in both instances the jury found against the defendant.

In order that there may be no misunderstanding as to the judgment of the court in the case, we lay down the following rule as applicable to the facts in the case: It will be observed that this despatch was in plain, unambiguous language. It said: "Send doctor on first train. Katy has broken her finger." When that despatch was received at Promontory for transmission, and when it was received at Ogden by the agents of the defendant, the supreme importance of prompt and active service upon the part of the defendant's agents in delivering that telegram was made manifest from its very reading, and we hold that the degree of diligence required of the defendant was equal in importance to the emergency of the occasion, and this without any regard to rules and hours established by the company, as testified to in this regard. It must be kept in mind that this company at Promontory, by its agent, received this despatch, and received the money for its transmission, and that it was transmitted to the office at Ogden; that this despatch was to the effect that a child was suffering with a broken finger; that it was important that a physician and surgeon be immediately sent; and to allow the defendant, upon the pretext that it was received out of its office hours, to let it lie there until 7.35 the next morning, and then to excuse it from delivery under such circumstances would be the greatest injustice. It would be to put the public at the mercy entirely, or we may say the caprice and will, of public institutions, to which they are compelled to resort in the transaction of business. So far as the receipt and delivery of telegrams with reference to commercial transactions are concerned, we do not express an opinion, but we do not hesitate to say that when a despatch shown to be received by the company for transmission, which upon its face demonstrates the importance of delivery, as in this case, the degree of

diligence is to be in proportion to the exigencies of that case. Nor has the defendant the right to complain at this. It sets itself up as a transmitter of messages for the public, and it receives franchises from the State, in order that it may do business; it receives money from the public for the transmission of messages, and, like all other institutions, it should be willing to deal with the public in a fair and just manner, and not undertake to screen itself behind mere office rules and hours, which in all probability are made for the mere convenience of the employees; and especially in cases like this, where human pain, suffering, and deformation hang upon prompt action. Nor are these views new, but find ample authority in adjudged cases of high respectability. As a sample we cite the cases of Telegraph Co. *v.* Broesche, 10 S. W. Rep. 734, and Telegraph Co. *v.* Sheffield, 10 S. W. Rep. 752. Other cases could be cited, but the foregoing are sufficient. The case was fairly submitted by the court to the jury, under instructions in some respects more favorable to the defendant than the law warranted, and we are satisfied that substantial justice has been reached, and the judgment of the court below will be affirmed, with the costs.

WESTERN UNION TELEGRAPH CO. *v.* NEEL.

SUPREME COURT OF TEXAS, 1894.

[86 *Tex.* 368.]

GAINES, J. "Upon the trial of the above entitled cause in the court below, it was shown, that Jodie Roden, a sister of the appellee Ella Neel, was lying at the point of death at her home near Hope, in Lavaca County; that a brother of appellee went to the town of Yoakum, where appellant had an office, about 4 o'clock in the morning of July 29, 1891, and caused a telegram to be sent to Cuero to be addressed to Mrs. Neel, care of the Dromgoole Hotel, asking her to come to her sister at once. The telegram was received at Cuero about 4.50 o'clock, but was not delivered until about 10 o'clock on the same morning. Mrs. Neel set out at once to go to her sister, but Mrs. Roden had died when Mrs. Neel arrived. If the telegram had been delivered promptly when it was received at Cuero, Mrs. Neel could have reached her sister before she died.

"In defence of this suit for failure to deliver said telegram promptly, the appellant pleaded and proved, that its office hours at Cuero were from 7 o'clock A. M. to 7 o'clock P. M., and that the messenger did not reach the office until 7 o'clock A. M.; and there was evidence that after this hour the telegram was promptly delivered; and it alleged that the fixing of office hours was a reasonable regulation, that it was permitted by law to make.

"The court charged the jury, in effect, that such regulation was proper, but that the sender of the telegram must either know or be reasonably presumed to know of it, or be informed thereof by defendant's agent.

"The defendant then requested the following instruction to the jury: 'All messages to be sent by telegraphic wire are accepted subject to the delays ordinarily incurred during transmission; and if the jury believe from the evidence that the defendant company had reasonable office hours, during which it delivered telegraphic messages in the town of Cuero, it was not by law compelled to deliver messages outside of said hours; and such reasonable business hours were implied in the contract between the plaintiff and defendant company, if such contract has been proved, unless specially stated or understood by the parties to said contract that the services to be performed should be performed otherwise than in the usual manner and subject to the usual rules under which the company does business.'

"The instruction asked by the defendant was pertinent, because if the message had been delivered within a reasonable time after 7 o'clock, the plaintiff would probably not have had time to see her sister before she died."

Upon the foregoing statement, which we have quoted from the certificate of the Court of Civil Appeals, they submit to us the following questions:

"Believing that it has never been authoritatively settled by our Supreme Court, that it is the duty in such case of the telegraph company to give notice to the sender of a despatch of the office hours at the receiving office, provided they are established and reasonable, and that the message will not be delivered outside of such office hours, we certify for the decision of the Supreme Court, which arises on appeal to this court, whether or not, in the absence of proof of a special contract to send and deliver at once, and the absence of actual notice to the sender of the regulation and office hours, the undertaking of the company was to deliver the message at once.

"Should the instruction have been given?"

We are of the opinion, that under the circumstances stated in the question, it was not the duty of the company to deliver before its office hours, and that the requested charge should have been given. A telegraph company, from the necessity of the case, must have power to make some regulations for the conduct of its business; and when such regulations are reasonable, it is generally conceded that a party who contracts with such a company for the transmission of a message is bound by them, provided he has notice of their existence. But whether or not he is bound when he has no notice, is a question which is by no means settled. We concur with the Court of Civil Appeals in holding that the question has never been authoritatively determined in this court.

Under the peculiar circumstances of the case, it was held in Western Union Telegraph Company *v.* Broesche, 72 Tex. 654, that the fact

that the company's office at the delivering station was closed at the time the despatch was transmitted, did not exonerate it from liability. But the agent of the company who accepted the message for transmission testified, that he knew that the purpose was to notify the person addressed of the expected arrival of the dead body of the plaintiff's wife at the railway station, and that unless it was delivered on the same evening the corpse would reach the station before the telegram. Having received the plaintiff's money, knowing his object in sending the message, and that that object could only be attained by prompt transmission and delivery to the person addressed, it could not legally urge its rules as to office hours as an excuse for not delivering the despatch until the next day. It was properly held estopped to deny that the contract was for an immediate delivery.

In the Bruner case, 19 Southwestern Reporter, 149, it would seem that the defence was set up, that at the time the despatch was taken for transmission the office to which it was to be sent was closed; but we think it is apparent from the opinion that the point before us was not involved. The court in their opinion say: "Appellant accepted the telegram and undertook to deliver it about 9 o'clock at night. It cannot be excused in its failure to perform the contract because its office was practically closed against Alvin, especially since it does not appear that any effort was made to send the message until next morning, when it was too late for the appellee to catch the train to Galveston."

Upon the more general question, whether a party to a contract with a telegraph company is bound by the rules and regulations of the company of which he has no notice, the authorities are not in accord.

In Birney *v.* Telegraph Company, 18 Md. 341, the court say, that a person delivering a message for transmission "is supposed to know that the engagements of the company are controlled by those rules and regulations, and does himself in law engraft them in his contract of bailment, and is bound by them." The doctrine is reaffirmed in Telegraph Company *v.* Gildersleeve, 29 Md. 232; but is questioned by Judge Thompson in his work on the Law of Electricity (section 212). The law of Maryland expressly provides that telegraph companies may make rules and regulations, and the opinions in the cases cited lay stress upon that fact; but it seems to us, that in the absence of a statute the power is necessarily implied.

In Given *v.* Telegraph Company, 24 Fed. Rep. 119, it was held, in effect, that a telegraph company could establish reasonable office hours, and that the sender of a message was presumed to contract with reference to such a regulation, although it was not known to him at the time that he entered into the contract.

In Telegraph Company *v.* Harding, 103 Ind. 505, the same rule was applied in an action for the recovery of a penalty given by statute for the failure to make prompt delivery of a message; but the court expressly decline to say that it ought to apply to an ordinary suit for the

recovery of damages for the breach of a contract to transmit a telegram. The court quote from the opinion of Mr. Justice Miller in Given's case, *supra*, as follows: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when any other office closes for the night. The immense number of these offices over the United States, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seems to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for the neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same State than those four thousand miles away, for the communication is between them all and of equal importance."

In Behm *v.* Telegraph Company, 8 Bissell, 131, Judge Gresham, in charging the jury, recognized the doctrine, that reasonable regulations as to the number of servants at small stations should be considered in determining the question of diligence in the delivery of a message, and that the absence of a messenger boy at dinner might be a just excuse for delay in such delivery. But see Tel. Co. *v.* Henderson, 89 Ala. 510.

Such are the cases bearing immediately upon the question submitted for our determination. There are, however, some railroad cases which seem to involve a similar principle. The contract of a railroad company with a passenger is to carry him to his point of destination under the contract without unreasonable delay. Yet it is held, that a passenger who procures a ticket has no right to demand an immediate carriage, and must wait till the departure of the regular trains. Hurst *v.* Railway, 19 C. B. N. S. 310; Gordon *v.* Railway, 52 N. H. 596. There are delays which grow out of the necessary regulation of the business, for which the carrier cannot be held responsible. If a passenger, on the other hand, be misled by the company's time table, and buy his ticket upon the faith of it, the company may be held liable for not carrying him according to the table. In an English case of this character the action was sustained on the ground of deceit. Denton *v.* Railway, 5 El. & Bl. 860.

A limit as to the number of its trains and intervals of time more or less extended are obviously indispensable to the conduct of the business of a railway company. So also with telegraph companies. Although not absolutely necessary, some regulations as to office hours and as to the number of employees at each office are reasonably required for the successful management of their business, both in their own interest and in that of the public in general. It may be to the interest of some individual, upon a particular occasion, or even at all times, that every office of a telegraph company should be kept open at all hours, and that the working force should be sufficient to receive and deliver a despatch without a moment's delay. So also, it may be to the interest of a very few that an office should be kept at some point

on the line where an office could not be maintained in any way without a loss to the company. If in the first instance the company should be required to keep the necessary servants to keep its business going at all hours, it would result in the necessity of closing many offices or in the imposition of additional charges upon its customers in general, in order to recoup the loss incident to their being maintained. So on the other hand, if they should be required to keep offices wherever it might result to the convenience of a few persons, additional burdens upon the general public would in like manner result.

It follows, we think, that the public interest demands that these companies should have the power to establish reasonable hours within which their business is to be transacted, and that individual interests must yield. It seems to us, that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract.

In the application of the principles of law to new cases, we should proceed with caution, and therefore we deem it proper to say that our ruling is restricted to the question submitted. Whether the rule we have announced should be applied to other regulations by telegraph companies, we leave for decision when the question may arise.

This opinion will be certified in answer to the questions submitted.

SEARS *v.* EASTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[14 *Allen*, 433.]

ACTION containing one count in contract and one in tort. Each count alleged that the defendants were common carriers of passengers between Boston and Lynn, and that on the 15th of September, 1865, the plaintiff was a resident of Nahant, near Lynn, and the defendants before then publicly undertook and contracted with the public to run a train for the carriage of passengers from Boston to Lynn at nine and one half o'clock in the evening each week day, Wednesdays and Saturdays excepted; and the plaintiff, relying on said contract and undertaking, purchased of the defendants a ticket entitling him to carriage upon their cars between Boston and Lynn, and paid therefor twenty-five cents or thereabouts, and on a certain week day thereafter, neither Wednesday nor Saturday, namely, on the 15th of said September, presented himself on or before the hour of nine and a half o'clock in the evening at the defendants' station in Boston and offered and attempted to take the train undertaken to be run at that hour, as a passenger, but the defendants negligently and wilfully omitted to run the said train at

that hour, or any train for Lynn, till several hours thereafter; wherefore the plaintiff was compelled to hire a livery carriage and to ride therein to Lynn by night, and was much disturbed and inconvenienced.

The following facts were agreed in the Superior Court. The defendants were common carriers, as alleged, and inserted in the Boston Daily Advertiser, Post, and Courier, from the 15th day of August till the 15th day of September an advertisement announcing the hours at which trains would leave Boston for various places, and among others that a train would leave for Lynn, at 9.30 P. M., except Wednesdays, when it would leave at 11.15, and Saturdays, when it would leave at 10.30.

The plaintiff, a resident of Nahant, consulted one of the above papers, about the 9th of September, 1865, for the purpose of ascertaining the time when the latest night train would start from Boston for Lynn on the 15th, in order to take the train on that day, and saw the advertisement referred to. On the 15th, which was on Friday, he came to Boston from Lynn in a forenoon train, and in the evening, shortly after nine o'clock, presented himself at the defendants' station in Boston for the purpose of taking the 9.30 train for Lynn, having with him a ticket which previously to September 9th he had purchased in a package of five. This ticket specified no particular train, but purported to be good for one passage in the cars between Boston and Lynn during the year 1865. He learned that this train had been postponed to 11.15, on account of an exhibition, and thereupon hired a buggy and drove to Lynn, arriving there soon after 10.30. He had seen no notice of any postponement of this train. He once, in 1864, observed a notice of postponement, and heard that the defendants sometimes postponed their late trains.

For several years before 1865 the defendants' superintendent had been accustomed occasionally to postpone this train, as often as from once to three times a month, for the purpose of allowing the public to attend places of amusement and instruction, and also upon holidays and other public occasions in Boston; giving notice thereof by handbills posted in the defendants' cars and stations. On the 13th of September, 1865, in pursuance of this custom, he decided to postpone this train for September 15th till 11.15, and on the same day caused notice thereof to be printed and posted in the usual manner. The train was so postponed, and left Boston at 11.15, arriving at Lynn at 11.45.

The defendants offered to prove, if competent, that this usage of detaining the train was generally known to the people using the Eastern Railroad, and that the number of persons generally going by the postponed train was larger than generally went by the 9.30 train, and was larger on the evening in question; but at the station in Boston there were persons complaining of the postponement of the train, and leaving the station.

It was agreed that, if on these facts the plaintiff was entitled to recover, judgment should be entered in his favor for ten dollars, without costs. Judgment was rendered for the defendants, and the plaintiff appealed to this court.

J. L. Stackpole, for the plaintiff.

C. P. Judd, for the defendants. If the plaintiff can maintain any action, it must be upon the count in contract. There was no proof of deceit. Tryon *v.* Whitmarsh, 1 Met. 1. What then was the nature of the contract between the parties? The ticket merely secured one passage at any time in 1865. This was a contract to carry the plaintiff in the usual way of transporting passengers. It was usual to postpone this train, in order to give the public greater accommodations. The plaintiff was bound by this usage, whether he knew it or not. If he neglected to inquire as to the custom, it is his own fault. Van Santvoord *v.* St. John, 6 Hill, 160; Cheney *v.* Boston & Maine Railroad, 11 Met. 121; Clark *v.* Baker, Ib. 186; City Bank *v.* Cutter, 3 Pick. 414; Ouimit *v.* Henshaw, 35 Vt. 616, 622. If the advertisement was an offer to carry passengers at 9.30, this offer was withdrawn on the 13th by due notice. M'Culloch *v.* Eagle Ins. Co., 1 Pick. 278; Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. The acquiescence in the usage of the defendants by the public for years shows that the notice was sufficient. The plaintiff should have made further inquiry. Booth *v.* Barnum, 9 Conn. 290; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Taylor *v.* Baker, 5 Price, 306.

Chapman, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties. Cheney *v.* Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad *v.* Proctor, 1 Allen, 267; Najac *v.* Boston & Lowell Railroad, 7 Allen, 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it. Denton *v.* Great Northern Railway, 5 El. & Bl. 860. It is an offer which, when once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised

to go from Boston to Lynn at 9.30 P. M., and the plaintiff presented himself, with his ticket, at the station to take the train, but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given, but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown *v.* Eastern Railroad, 11 Cush. 101; Malone *v.* Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware *v.* Hayward Rubber Co., 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.[1]

[1] *Compare:* Denton *v.* Gt. No. R. R., 5 E. & B. 860; Savannah Co. *v.* Berrand, 58 Ga. 180; Pittsburgh Co. *v.* Nuzum, 50 Ind. 141; Duling *v.* R. R., 66 Md. 120; Claybrook *v.* R. R., 12 Mo. 432; Gordon *v.* R. R., 52 N. H. 596; Purcell *v.* R. R., 108 N. C. 414; Wilson *v.* R. R., 63 Miss. 352; Platt *v.* R. R., 63 Mo. 511. —Ed.

CHICAGO, B. & Q. R. CO. *v.* GUSTIN.

SUPREME COURT OF NEBRASKA, 1892.

[35 *Neb.* 86.[1]]

MAXWELL, C. J. . . . The plaintiff below offered in evidence the following bill of lading:

"12-14-86-150 M. Form 71.

"CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RY. CO.

"EDGAR HILL, Gen'l Freight Agent, Cleveland, O.
"A. S. WHITE, Assist. Gen'l Freight Agent, Cleveland, O.

This bill of lading to be presented by consignee without alteration or erasure.	CLEVELAND, O., 9-8, 1888.
MARKS, CONSIGNEE, ETC.	Received from the Eberhard Manf. Co., in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as per ——
A. J. Gustin, Lincoln, Neb.	
This bill of lading contracts rates from —— to Wann, Ill., via ——, at 25c. per lot and charges advanced at $——.	

One box iron castings $1 25

(Printed across the end: "C., C., C. & I. Ry. Gen'l Freight F. A., Pivi Sch. 8, 1888. E. L. Campbell, per —— B. This stamps receipts for freight but not for rates. Rate, 292 pr. 100 lbs. Wann, Ill., to Lincoln, Neb. Guaranteed by Western road.")
which the C., C., C. & I. Ry. agrees to transport with as reasonable despatch as its general business will permit to destination, if on its road, or otherwise to the place on its road where the same is to be delivered to any connecting carrier, and there deliver to the consignee or to such connecting carrier upon the following *terms* and *conditions*, which are hereby agreed to by the shipper, and by him accepted as just and reasonable, and which are for the benefit of every one over whose line said goods are transported:

"1st. Neither this company, nor any other carrier receiving said property to carry on its route to destination, is bound to carry the same by any particular train, or in time for any particular market, and any carrier in forwarding said property from the point where it leaves its line is to be held as a forwarder only.

"2d. Neither this company nor any such other carrier shall be liable for any loss of or damage to said property by dangers or accident incident to railroad transportation, or by fires or floods while at

[1] This case is abridged.—ED.

depots, stations, yards, landings, warehouses, or in transit. And said property is to be carried at owner's risk of leakage, breakage, chafing, loss in weight, or loss or damage caused by changes in weather, or by heat, frost, wet, or decay, and if any portion of its route to destination is by water, of all damages incident to navigation.

"3d. Responsibility of any carrier shall cease as soon as said property is ready for delivery to next carrier or to consignee, and each carrier shall be liable only for loss or damage occurring on its own line, and in case of loss or damage to such property for which any carrier shall be responsible, its value or cost at time and place of shipment shall govern settlement therefor, unless a value has been agreed upon with shipper or is determined by the classification upon which the rate is based, in which case the value so fixed by agreement or classification shall govern; and any carrier liable on account of loss of or damage to such property shall have the benefit of any insurance effected thereon by or on account of the owner or consignee thereof.

"4th. Such property shall be subject to the necessary cooperage and bailing at owner's cost; and if the owner or consignee is to unload said property, the delivering carrier may make a reasonable charge per day for the detention of any car after the same has been held twenty-four hours for unloading, and may add such charge to the freight due and hold said property subject to a lien therefor."

. . . . . .

This bill was objected to, for the reason that there was no evidence of its authenticity and because the company could not bind the C., B. & Q. Railway Company. These objections were overruled and the bill received.

It will be observed that the answer of the railroad company admits receiving at Wann, Illinois, a box of saddlery hardware weighing 125 pounds, admits in effect all that is claimed in the petition, except that they do not wrongfully withhold the same, and it alleges that the hardware is a kind classified as No. 2 in the schedule. There was no error in admitting the bill of lading, therefore. In a case of this kind, where the employment is not denied, it is probable that the bill is *prima facie* admissible in evidence, and a denial of its genuineness must be made by the adverse party to require proof on the point, but it is unnecessary to determine that point. It appears from the testimony that goods are not infrequently labelled improperly. Thus, common hardware in boxes is placed in the fourth class, while saddlery hardware is classified as No. 2; that the companies have inspectors to open the packages and place the goods in the proper class; that in this instance the inspector opened the box, which was filled with Japanned iron rings, and, as Mr. Gustin had been engaged in the saddlery business, he at once seems to have assumed that the rings were designed for that business, and at once classified the goods as No. 2, the freight on which is eighteen cents per hundred. It is clearly shown that the rings are a new patent designed for a neck yoke for horses, and in no way

connected with saddlery hardware. Upon this point there is practically no dispute, so that the classification No. 4 is correct, and the rates as shown by the schedule are less than sixty-two cents per hundred, and as Mr. Gustin had offered to pay that sum, he was entitled to recover. There is no error in the record, and the judgment is

Affirmed.

The other judges concur.[1]

PHILLIPS *v.* SOUTHERN RAILWAY.

SUPREME COURT OF NORTH CAROLINA, 1899.

[124 *N. C.* 123.[2]]

FURCHES, J. On the 15th of December, 1896, the plaintiff, intending to take the next train on defendant's road to Hot Springs, in Madison County, entered the defendant's waiting-room at Asheville about eight o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave at 1.20 o'clock of the next morning. He was informed by defendant's agent, in charge of the waiting-room, that according to the rules of the company, she must close the room and that he would have to get out. The plaintiff protested against this, and refused to leave.

But when the clerk of defendant's baggage department (Graham) came and told him that he could not stay, and made demonstrations as if he would put him out, he left; that he had no place to go where he could be comfortable; that the night was cold; that he was thinly clad and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness from which his health has been permanently injured.

It was in evidence, and not disputed, that the rules of defendant company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting-room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train at 1.20 o'clock of the next morning. . . .

So the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting-room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule and that it was a reasonable one. Webster *v.* Fitchburg R. Co., 161 Mass. 298; 34 At. Rep.

[1] *Compare:* Savannah Co. *v.* Bundick, 94 Ga. 775; Smith *v.* Findley, 34 Kans. 316; Wellington *v.* R. R., 107 Mass. 582; Express Co. *v.* Koerner, 65 Minn. 540; Baldwin *v.* S. S. Co., 11 Hun, 496; New York Co. *v.* Gallaher, 79 Tex. 685. —ED.

[2] Part of the opinion is omitted. — ED.

157; 1 Elliott on Railroads, sections 199 and 200; 4 Elliott on Railroads, section 1579.

The rule would probably be different in the case of through passengers, and in the case of delayed trains; but if so, these would be exceptions and not the rule.

Waiting-rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers. But they are established by carriers as ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error.

New trial.

ORNE *v.* BARSTOW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1900.

[175 *Mass.* 193.]

HOLMES, C. J. This is a petition to enforce a mechanic's lien. At the trial the copy of the statement put in evidence by the petitioners bore the indorsement "A copy of mechanic's lien, filed with Middlesex So. District Registry of Deeds, Feb. 14, 1898, at 8 h. 0 m. A. M. Recorded book 2633, page 521. Attest: Thos. Leighton, Jr., Ass't Register." It is agreed that this was not within the thirty days allowed for filing such statements by Pub. Sts. c. 191, § 6, but evidence was admitted which showed the following facts. The office hours of the registry on Saturdays were from 8 A. M. to 1 P. M. On Saturday, February 12, which was within the thirty days, between half-past one and two, P. M., the petitioners' attorney, having got into the office after it was closed, tendered the statement and the fee to the register, who was there but refused to receive it. By the register's suggestion the attorney thereupon put the statement and fee into an envelope which the register gave him, was escorted to the door by a clerk, and after the door was closed pushed the envelope under the door. He was watched through a glass panel by the clerk, and the fair inference is that the clerk took the envelope, which was on the register's desk on Monday morning. The court ruled not only that the certificate of the register as to the time of filing was conclusive, but also that what was done by the attorney did not amount to a filing; and the case is here on exceptions.

There is no doubt that the register's certificate was evidence, if not conclusive evidence, of the time of filing. Wood *v.* Simons, 110 Mass. 116; Fuller *v.* Cunningham, 105 Mass. 442. The statement was left

for record. Pub. Sts. c. 191, § 7. The register was required to note the time of reception, and every instrument is considered as recorded at the time so noted. Pub. Sts. c. 24, § 15. The register is also to certify the time upon the instrument. Pub. Sts. c. 24, § 21. We do not think that the statutes mean to distinguish between receiving, recording, and filing, so far as this case is concerned. We perceive no inconsistency in principle with these general provisions in Pub. Sts. c. 147, § 12, and c. 192, § 4, by which certain instruments are to be considered as recorded at the time when left for the purpose in the clerk's office. It is assumed that the time of leaving and the time noted are the same, or, in other words, that the clerk will note the true time. But the last named sections refer to different instruments and to city or town clerks, and do not affect the present case. Neither do we see anything adverse to the conclusiveness of the register's certificate in decisions that a court is not prevented by its own record, which it has power to correct if erroneous, from looking into the facts as to when a petition was filed. Goulding *v.* Smith, 114 Mass. 487, 489; Clemens Electrical Manuf. Co. *v.* Walton, 168 Mass. 304.

But in the case at bar the parties very properly avoided raising a question as to the conduct of a register who meant to do his duty (Tracy *v.* Jenks, 15 Pick. 465, 468) by going into the facts, and the judge ruled upon them irrespective of the question whether the certificate was conclusive as it stood. If the judge had ruled that the facts did amount to a filing, and the ruling had been accepted by the parties, undoubtedly the register would have amended his certificate so as to avoid concluding the petitioners under the other ruling of the judge. At least there was such a possibility that the register might amend that we cannot treat the ruling as immaterial on the ground that, however the facts might be, the petitioners could not contradict the register's certificate as to the time. It was not argued that the register would not have power to amend under the same conditions as those on which other officers may amend records. See Baldwin *v.* Marshall, 2 Humph. 116; Sellers *v.* Sellers, 98 N. C. 13, 18, 19.

We are of opinion that, on the facts proved, the statement was filed on Saturday afternoon. We shall go no further in our decision than this case requires. We shall not undertake to decide whether the register had a right, under Pub. Sts. c. 24, § 12, to close his office as early as he did, so far as to exonerate himself from liability had some one come to the office and found it empty. But he was there. With his knowledge and assent the instrument was left within the enclosure of the office or its approach, for the purpose of being recorded. It was taken into his custody by his servants or agents. He undertook to refuse legal effect to the deposit, it is true, but in our opinion that was beyond his power. It was the petitioners' right, if they found the register in his office on a week day and during daylight, to insist on their statement being filed forthwith, and it is no answer to say that the

register might have been absent without liability under the law. As the petitioners did all that they could do, or were bound to do, the register's conduct did not affect their rights. See Sykes *v.* Keating, 118 Mass. 517, 519; Watkins *v.* Bugge, 56 Neb. 615; Dodge *v.* Potter, 18 Barb. 193, 202.

Exceptions sustained.

Section 2. To Enter into Contracts.

MAYHEW *v.* EAMES.

King's Bench, 1825.

[3 *B. & C.* 601.]

This was an action against the defendants, as carriers, brought to recover the value of a parcel of country bank notes sent by their coach from Downham, in the county of Norfolk, to London. At the trial before Abbott, C. J., at the London sittings after last term, the following appeared to be the facts of the case. The plaintiffs were silk warehousemen, residing in London, and employed one Hughes as their agent to collect their debts in the country. The defendants were coach proprietors and owners of a coach running from Lynn to the White Horse, Fetter Lane, London. On the 10th of February, 1824, Hughes, the agent of the plaintiffs, having collected, in payment of debts due to them, provincial banker's notes to the amount of £87, inclosed them in a parcel, and upon the parcel he wrote the word "Mourning," and addressed it to the plaintiffs, "Foster Lane, Cheapside, London." Hughes then delivered the parcel to one Wright, at whose house in Downham the coach stopped to change horses, and he paid for the carriage 1*s.* 2*d.*, and Wright gave him a receipt for the parcel. When the coach arrived, Wright delivered the parcel to the coachman, and it was afterwards lost. For the defendant it was proved, that the plaintiffs had frequently received parcels before the 10th of February coming by coaches to the White Horse, Fetter Lane, London, and the porter who delivered such parcels proved that he had always delivered with them a ticket containing the amount of the charge for carriage and porterage, and a printed notice, "that the proprietors of carriages which set out from that office would not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever above the value of £5 if lost or damaged, unless the same were entered as such and paid for accordingly when delivered there, or to their agents in town or country; nor would they be accountable for any glass, china, plate, watches, writings, cash, bank notes, or jewels of any description, however small the value." But there was no evidence to show that Hughes had any knowledge of such notice at the time when he delivered the parcel to Wright. Upon this evidence the Lord Chief Justice was of opinion that as the plaintiffs knew that the defendants were not accountable for bank notes, they ought to have desired their agent not to send parcels of that description by any coach of the defendants, and the plaintiffs were nonsuited, with liberty to them to move to enter a verdict for £87.

Per Curiam. At common law, carriers are responsible for the value of the goods they undertake to carry, but they may limit their responsibility by making a special contract, and that is usually done by giving public notice that they will not be accountable for parcels of a given description. In order, however, to show in any particular case that they are not subject to the common-law responsibility, they must prove that the party sending the goods had knowledge of the notice. But the knowledge of the principal is the knowledge of the agent. Now here the agent was employed to transmit bank notes, which are the subject of the present action, and it appears that the plaintiffs themselves had knowledge that the defendants would not be responsible for bank notes, because it is in evidence that many parcels came to them from the defendants, and that the porter delivered together with such parcels a printed paper containing a notice that "the proprietors of carriages setting out from the White Horse, Fetter Lane, would not hold themselves accountable for any glass, china, plate, watches, writings, cash, bank notes, or jewels of any description, however small the value." Now when a parcel came to the plaintiffs in this way before, they must have seen the notice, because it was contained in the same paper which they must have looked at in order to ascertain the amount of the charge for carriage and porterage which they had to pay. Then if the plaintiffs knew that parcels would not be accounted for if they contained bank notes, it was their duty to tell their agent not to send any such parcels by any of the coaches coming to the White Horse, Fetter Lane. But as the plaintiffs suffered their agent to send notes by those coaches, we think that knowledge of the notice having been brought home to the plaintiffs, the carrier is thereby protected from such loss, although the parcel was sent by an agent.

Rule refused.[1]

CARRIERS' ACT, 11 Geo. IV. & 1 Wil. IV., c. 68.

§ 1. . . . No mail contractor, stage-coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following . . . contained in any parcel or package . . . when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering

[1] "The doctrine of notice was never known until the case of Forward *v.* Pittard, 1 T. R. 27, which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shown on the record; it only arises in defence of the carrier, and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into *Westminster Hall*." Borrough, J., in Smith *v.* Horne, 8 Taunt. 144 (1818). — Ed.

the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

§ 4. . . . No public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in any wise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractor, stage-coach proprietor, and common carrier as aforesaid shall . . . be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

§ 6. . . . Nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail carrier, stage-coach proprietor, or common carrier and any other parties, for the conveyance of goods and merchandises.

WALKER *v.* YORK AND NORTH MIDLAND RAILWAY.

Queen's Bench, 1853.

[2 *E. & B.* 750.]

The cause was first tried before Lord Campbell, C. J., at the sittings in London after last Hilary Term, when a general verdict passed for the plaintiff: but a new trial was granted, in order that it might be ascertained whether a notice hereafter mentioned had been served on the plaintiff or not: the defendants were to admit the rest of the plaintiff's case, and the amount of damages.

On the second trial, before Coleridge, J., at the sittings in London during last Trinity Term, the following facts were agreed on by both sides. The plaintiff was a fish merchant at Scarborough. There is railway communication from Scarborough to Manchester and to London. The terminus at Scarborough is part of the defendants' railway, which communicates with other railways leading to Manchester and London. The defendants, as is usual, collect goods at their own terminus and forward them through the connecting lines to their destination; and it was admitted that the fish in question had been sent by defendants' line, and not delivered in due time, to the damage of plaintiff. The learned judge ruled that, after these admissions, made in obedience to the rule granting the new trial, the *onus* lay on the defendants; and their counsel began. The parts of the evidence, material to the question discussed in banc, were as follows:

The defendants had caused a large number of notices to be printed; of which the following is a copy:

"York and North Midland Railway. Notice. Fish Traffic. Fish being a perishable and consequently a hazardous article of traffic, The York and North Midland Railway Company hereby give notice that, on and after the 12th April, 1852, they will carry it at the reduced rates at present charged, or which may hereafter be charged, below the rate which the said company is entitled to charge, on the following conditions only. . . .

"2. This company is not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any particular market; nor are they to be required to carry or forward by any particular train, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned. . . .

"4. The station clerks and servants of the company have no authority to alter or vary these conditions."

A clerk, ordinarily employed for defendants at York, who was called for defendants, proved that, on 2d September, 1852, he was sent with a large number of these printed notices to Scarborough; and at Scarborough received, from the station master there, a list of the fishdealers at Scarborough. He then went down to the sands, where the fishing boats were coming in, and where consequently many of the fishdealers were assembled, and there served as many of them as he could with copies of the notice. Amongst others, he served a person whom he believed to be the plaintiff; but, as he was not then personally acquainted with the plaintiff, he could not speak very positively to the identity. On cross-examination it appeared that the persons served were very angry; that many tore up the notices and said that they would not be bound by them; and that there was considerable disturbance. The station master at Scarborough gave evidence that, on the 3d September, he saw the plaintiff, who said to him: "What is the use of sending that old fellow to serve these notices? they are of no use." The fish, the subject of the first count, were sent off on that same 3d of September. The plaintiff himself, who was called as a witness, denied having been personally served with the notice, and denied having ever consented to be bound by its terms. The learned judge left it to the jury to say whether there was a special contract or not. He told them that the first question was one of fact, whether the plaintiff was served with the notice; and that, if they were of that opinion, they might infer a special contract. And he advised them to draw that inference from the receipt of the notice and the subsequent sending of the goods, unless, in the interim, the plaintiff had unambiguously refused to deliver the goods on the terms of the notice, and the defendants had acquiesced in that refusal. The jury found that there had been a service of the notice, and that there was a special contract. The verdict was entered for the defendants on the

second and third issues, and the corresponding issues on the pleas to the other counts.

M. Chambers, in last Trinity Term, obtained a rule *nisi* for a new trial, on the ground of misdirection.[1]

WIGHTMAN, J. The question is, Whether there was any evidence from which the jury might find a special contract. It is not raised quite in that form; but that is the substantial question. The defendants had served the plaintiff with a notice that, in consideration of their carrying fish at reduced charges, they would require their customers to agree to certain conditions on which, and on which only, they would carry fish; and they also state in the notice that no servant of theirs has power to alter these terms. The question is, Whether the fish in question was received under a contract to carry on these terms. Now the plaintiff did not assent in express words to these conditions: on the contrary, he objected to them; but still, for all that, he sent the goods, knowing that no servant had power to alter the conditions, and that they would be accepted on those conditions only: and I think he must be taken to have sent them on these terms unless there was something in the law to prevent the conditions from binding. Mr. Cowling contends that there is such a law, and that statute 11 Geo. IV. & 1 Wil. IV. c. 68, s. 4, prevents this notice from affecting the liability of the defendants as carriers: but I do not think that such is the effect of the act. It is confined, I think, to public notices, such as were very common before the act; notices addressed to the public at large, raising a question, in every case, whether the notice was brought home to the particular person; I do not think it applicable to a notice specifically delivered to a particular person to form the basis of a special contract with him. The judge told the jury that, if such a notice was specifically delivered to the plaintiff, unless it could be shown that he dissented from those terms, and the defendants acquiesced in his dissent, they ought to infer that the plaintiff, persisting in sending the goods, assented to their being taken on the terms. I think so too. If a man is told that goods will not be received except on certain terms, and notwithstanding this he will send the goods, I think that he must be taken to agree that they shall be taken on these terms. Statute 11 Geo. IV. & 1 Wil. IV. c. 68, s. 6, expressly saves special contracts; and I think Mr. Cowling hardly contended that a special contract might not be proved by a letter sent to an individual addressed to him, and a subsequent delivery of the goods, though, if such a notice is in the shape of a circular, he says it is within section 4. But I think section 4 is limited to public notices, advertised or put up in an office.

[1] The statement of facts has been abridged and arguments of counsel and concurring opinions of Lord CAMPBELL, C. J., and COLERIDGE, J., have been omitted. — ED.

RAILWAY AND CANAL TRAFFIC ACT OF 1854, 17 & 18 Vict. c. 31.

§ 7. Every such company as aforesaid [railway and canal companies] shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void; provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say), for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of value so declared. . . . Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage.

RAILROAD *v.* LOCKWOOD.

Supreme Court of the United States, 1873.

[17 *Wall.* 357.]

Error to the Circuit Court for the Southern District of New York; the case being thus: —

Lockwood, a drover, was injured whilst travelling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign

an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

Bradley, J.[1] It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely

[1] Part of the opinion is omitted. — Ed.

done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances. . . .

It is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr *v.* The New Jersey Steam Navigation

Company, 1 Kern. 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough, — if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer choose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the

conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his custom-

ers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence — an excuse so repugnant to the law of their foundation and to the public good — they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

Judgment affirmed.[1]

MYNARD *v.* SYRACUSE, BINGHAMPTON, AND NEW YORK RAILROAD.

COURT OF APPEALS, NEW YORK, 1877.

[71 *N. Y.* 180.]

CHURCH, C. J.[2] The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising," should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or wilful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

[1] *Compare:* Merch. D. T. Co. *v.* Cornforth, 3 Col. 280; Adams Exp. Co. *v.* Stettaners, 61 Ill. 184; M. S. & N. I. R. R. *v.* Heaton, 37 Ind. 448; Ketchum *v.* Amer. M. U. Exp. Co., 52 Mo. 390; Davidson *v.* Graham, 2 Oh. St. 131; L. & N. R. R. *v.* Gilbert, 88 Tenn. 430. — ED.

[2] Part of the opinion is omitted. — ED.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities — one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. (U. S. R.) 344, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this State. In Alexander *v.* Greene, 7 Hill, 533, the stipulation was to tow plaintiff's canal boat from New York to Albany at the risk of the master and owners, and the Court of Errors reversed a judgment of the Supreme Court with but a single dissenting vote, and decided that the language did not include a loss occasioned by the negligence of the defendants or their servants. In one of several opinions delivered by members of the court, it was said, in respect to the claim for immunity for negligence: "To maintain a proposition, so extravagant as this would appear to be, the stipulation of the parties ought to be most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred."

Wells *v.* Steam Navigation Co., 8 N. Y. 375, expressly approved of the decision of Alexander *v.* Greene, and reiterated the same principle. Gardiner, J., in speaking of that case said: "We held, then, if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement; and that a stipulation so

extraordinary, so contrary to usage and the general understanding of men of business, would not be implied from a general expression to which effect might otherwise be given."

So, in the Steinweg Case, 43 N. Y. 123, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the Magnin case, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid."

It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence, Johnson, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that he expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of Lockwood *v.* Railroad Co., 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the question cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 N. Y. 485; 24 N. Y. 181–196; 25 N. Y. 442; 42 N. Y. 212; 49 N. Y. 263; 51 N. Y. 61.[1]

The remedy is with the Legislature, if remedy is needed. But, upon the question involved here, it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uni-

[1] *Compare:* Carr *v.* L. & Y. Ry., 7 Ex. 707; McCawley *v.* Furness Ry., L. R. 8 Q. B. 57; Black *v.* Goodrich Transp. Co., 55 Wis. 319. — Ed.

form course of decisions in this and most of the other States, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity, or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

QUIMBY *v.* BOSTON AND MAINE RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1890.

[150 *Mass.* 365.]

DEVENS, J. When the plaintiff received his injury, he was travelling upon a free pass, given him at his own solicitation and as a pure gratuity, upon which was expressed his agreement that in consideration thereof he assumed all risk of accident which might happen to him while travelling on or getting on or off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "Provided he signs the agreement on the back hereof." In fact, the agreement was not signed by the plaintiff, he not having been required to do so by the conductor, who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed it, and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire *v.* New York Central Railroad, 98 Mass. 239; Hill *v.* Boston, Hoosac Tunnel & Western Railroad, 144 Mass. 284; Boston & Maine Railroad *v.* Chipman, 146 Mass. 107.

The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein because he did not and was not required to sign it. Gulf, Colorado, & Santa Fé Railway *v.* McGown, 65 Texas, 640, 643; Illinois Central Railroad *v.* Read, 37 Ill. 484; Wells *v.* New York Central Railroad, 24 N. Y. 181; Perkins *v.* New York Central Railroad, 24 N. Y. 196. If this is held to be so, the case presents the single question whether such a contract is invalid, which has not heretofore been settled in this State, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been

made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. Todd *v.* Old Colony & Fall River Railroad, 3 Allen, 18; Commonwealth *v.* Vermont & Massachusetts Railroad, 108 Mass. 7; Littlejohn *v.* Fitchburg Railroad, 148 Mass. 478; Files *v.* Boston & Albany Railroad, 149 Mass. 204; Philadelphia & Reading Railroad *v.* Derby, 14 How. 468; Steamboat New World *v.* King, 16 How. 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases, the English courts, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a free pass, issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would, without doubt, be applied where a servant, from the peculiar character of goods, such as delicate machinery, is permitted to accompany them, and in other cases of that nature. That passes of this character are free passes properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice Bradley, in Railroad Co. *v.* Lockwood, 17 Wall. 357, 367; and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger, instead of one for hire. Railway Co. *v.* Stevens, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one travelling upon a drover's pass, as it is sometimes called, is a free passenger, they show that, in the opinion of those courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case

at bar there is no question of any wilful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the risk of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are Griswold *v.* New York & New England Railroad, 53 Conn. 371, decided in 1885, and that of Gulf, Colorado, & Santa Fé Railway *v.* McGown, 65 Texas, 640, decided in 1886, in which the precise question before us was raised and decided, after a careful examination of the authorities, and opposite conclusions reached, by the highest courts of Connecticut and of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passenger was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the Commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff, that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier is dependent upon the contract; that, while with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers in safety; and that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said, that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgle or seek redress in the courts; that he must take the alternative the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation by being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in few words, public policy forbids that a contract should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity, or as a gratuity.

Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where

passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or by other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that, while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, or that of the corporation itself where that is the carrier, he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, in respect to the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. Steamboat New World *v.* King, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of the defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or to furnish proper appliances for the conduct of its business.

We are of opinion that where one accepts purely as a gratuity a free

passage in a railroad train, upon the agreement that he will assume all risk of accident which may happen to him while travelling in such train by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must, therefore, be

Judgment for the defendant.

GRACE *v.* ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868.

[100 *Mass.* 505.]

CONTRACT, against the defendants, who carried on business under the name of the Adams Express Company, to recover the value of a package of money. In the Superior Court, judgment was ordered for the plaintiff on agreed facts, and the defendants appealed. The agreed facts were as follows:

"It is agreed that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, in the State of North Carolina, March 21, 1865, a package containing one hundred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts, and the said express company at the same time delivered to the plaintiff a bill of lading, a copy whereof is hereto annexed, and which makes part of this statement; that the said express company shipped said package with other packages from Wilmington by the steamship General Lyon, which ship was accidentally burned at sea, and said package thereby destroyed. It is further agreed, if evidence of the fact be admissible, that the plaintiff would testify that when the plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The material parts of the bill of lading, of which the copy was annexed, were as follows:

"Adams Express Company. Great Eastern, Western & Southern Express Forwarders. $150. Form 5. Wilmington, March 21, 1865. Received from ——— One P., Sealed and said to contain one hundred and fifty dolls. Addressed, Patrick Corbett, Taunton, Mass.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation — such delivery to terminate all liability of this company for such package; and also, that this company is not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, . . . occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. For the Company. Robinson."

COLT, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part. It is not necessary to discuss here, how far in this or other respects he may escape those liabilities which the policy of the law imposes, by mere notices brought home to the employer, or whether the effect of such notices may not be held to vary according as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. Judson *v.* Western Railroad Co., 6 Allen, 486; York Co. *v.* Central Railroad Co., 3 Wallace, 107; Hooper *v.* Wells, 27 Cal. 11; and see article by Redfield, with collection of authorities, 5 Am. Law Reg. (N. S.) 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that, upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper. The case of Rice *v.* Dwight Manufacturing Co., 2 Cush. 80, 87, is an authority in point. In an action to recover for work done, the defence was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by Forbes, J., that where a party enters into a written contract, in the absence of fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also Lewis *v.* Great Western Railway Co., 5 H. & N. 867; Squire *v.* New York Central Railroad Co., 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of Brown *v.* Eastern Railroad Co., 11 Cush. 97, and Malone *v.* Boston & Worcester Railroad Co., 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of Buckland *v.* Adams Express Co., 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the court. The legal principles upon which that case was decided are those here stated. It was a case upon an agreed statement of facts; and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances, it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of Perry *v.* Thompson, 98 Mass. 249, which is to be distinguished from the case at bar by the fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in Fillebrown *v.* Grand Trunk Railway Co., 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the

consignor, who delivered the goods at the station, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportion. Squire *v.* New York Central Railroad Co., 98 Mass. 239. *Judgment for the defendant.*[1]

BLOSSOM *v.* DODD.

COURT OF APPEALS, NEW YORK, 1870.

[43 *N. Y.* 264.]

CHURCH, C. J. The common-law liability of common carriers cannot be limited by a notice, even though such notice be brought to the knowledge of the persons whose property they carry. Dorr *v.* N. J. Steam Navigation Co., 1 Kern. 485. But such liability may be limited by express contract. Dorr *v.* N. J. Steam Navigation Co., 1 Kern. 485; Bissell *v.* N. Y. Central R. R. Co., 442; French *v.* Buffalo, N. Y. & Erie R. R. Co., 4 Keyes, 108.

The principal question in this case is, whether there was a contract made between the parties limiting the liability of the defendants to a loss of $100 for the valise and its contents, which the plaintiff intrusted to their care. A facsimile of the card upon which the alleged contract was printed has been furnished in the papers. It does not appear, on examination, like a contract, and would not, from its general appearance, be taken for anything more than a token or check denoting the numbers of the checks received, to be used for identification upon the delivery of the baggage. The larger portion of the printed matter is an advertisement, in large type. The alleged contract is printed in very small type, and is illegible in the night by the ordinary lights in a railroad car, and is not at all attractive, while other parts of the paper are quite so.

Considerable stress is laid upon the fact that the words, "Read this receipt," were printed on the card in legible type. The receipt reads: "Received of M—— articles or checks numbered as below: 368–319." "For Dodd's Express." The blank is not filled, nor is the receipt signed by any one. The invitation is not to read the contract, but the

[1] *Compare:* Lawrence *v.* N. Y. P. & B. R. R., 36 Conn. 63; L. & N. R. R. *v.* Brownlee, 14 Bush, 590; Kirkland *v.* Dinsmore, 62 N. Y. 171; Farnham *v.* C. & A. R. R., 55 Pa. 53; Dillard *v.* L. & N. R. R., 2 Lea, 288. — ED.

receipt. In order to read it, the paper must be turned sideways; and no one, thus reading the receipt, would suspect that it had any connection with the alleged contract, which is printed in different and very small type across the bottom of the paper. It is no part of the receipt, is not connected with it, and is not referred to in any other part of the paper. The defendants are dealing with all classes of the community; and public policy, as well as established principles, demand that the utmost fairness should be observed.

This paper is subject to the criticism made by Lord Ellenborough, in Butler *v.* Heane, 2 Camp. 415, in which he said that "It called attention to everything that was attractive, and concealed what was calculated to repel customers;" and added: "If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it." Nor did the nature of the business necessarily convey the idea of a contract to the traveller in such a manner as to raise the presumption that he knew it was a contract, expressive of the terms upon which the property was carried, or limiting the liability of the carrier. Baggage is usually identified by means of checks or tokens. And such a card does not necessarily import anything else. At all events, to have the effect claimed, the limitation should be as conspicuous and legible as other portions of the paper. In Brown *v.* E. R. R. Co., 11 Cush. 97, where the limitation was printed upon the back of a passenger ticket, the court says: "The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket." In the case of Prentice *v.* Decker, 49 Barb. 21, and Limburger *v.* Westcott, 49 Barb. 283, limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts. A different construction was put upon the delivery of a similar card, in Hopkins *v.* Westcott, 6 Blatchf. R. 64; but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of Grace *v.* Adams, 100 Mass. 560, relied upon by the defendant's

counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew that the paper contained the conditions upon which the money was to be carried, and was, therefore, presumed to have assented to them, although he did not read the paper. The court say: "It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading." So, in Van Goll *v.* The S. E. R. Co., 104 Eng. Com. Law R. 75, the same principle was decided. Willes, J., said: "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." Keating, J., said: "It was incumbent on the company to show that such was the contract." . . . "I think there was evidence that the plaintiff assented to those terms."

As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents, or to assent to them.

The circumstances under which the paper was received repel the idea of a contract. No such intimation was made to the plaintiff. He did not, and could not, if he had tried, read it in his seat. It is found that he might have read it at the end of the car, or by the lights on the pier or in the ferryboat; and it is claimed that he should have done so, and, if dissatisfied, should have expressed his dissent. If he had done so, and, in the bustle and confusion incident to such occasions, could have found the messenger and demanded his baggage, the latter might have claimed, upon the theory of this defence, that the contract was completed at the delivery of the paper, and that he had a right to perform it and receive the compensation.

It is impossible to maintain this defence without violating established legal principles in relation to contracts. It was suggested on the argument, that the stipulation to charge according to the value of the property is just and proper. This may be true; but the traveller should have something to say about it. The contract cannot be made by one party. If the traveller is informed of the charges graduated by value, he can have a voice in the bargain; but, in this case, he had none. Whilst the carrier should be protected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud. The carrier must deal with the public upon terms of equality; and, if he desires to limit his liability, he must secure the assent of those with whom he transacts business.

My conclusion is, that no contract was proved.

1. Because it was obscurely printed.

2. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper contained the contract.

3. Because the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge, or assented in fact to the terms of the alleged contract.

The order granting a new trial must be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All the judges concurring, upon the ground that no contract limiting the liability of defendants was proved.

Order affirmed, and judgment absolute for the plaintiff ordered.[1]

ANCHOR LINE *v.* DATER.

SUPREME COURT OF ILLINOIS, 1873.

[68 *Ill.* 369.]

BREESE, C. J.[2] This was an action on the case, against appellants as a common carrier, for failing to carry and deliver to the consignee two hundred barrels of flour. The general issue was pleaded, and the cause tried by the court without a jury, who found the issue for the plaintiffs, and assessed their damages at fourteen hundred dollars.

A motion for a new trial was overruled and judgment rendered for the plaintiffs.

To reverse this judgment the defendants appeal.

The flour was destroyed in the warehouse of appellants by the great October fire. It was delivered to appellants' agent late on Saturday, the 7th day of October, too late in the day to be placed on board the propeller of that day, and was warehoused in a safe warehouse.

The bill of lading delivered to the consignors relieves the carrier from liability for loss by fire, while the property is in transit or while in depots, &c.

This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed.

The court, sitting as a jury, did not find evidence sufficient to justify it in presuming assent from the mere acceptance of the receipt. The shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone. It is in proof

[1] *Compare:* Ramaley *v.* Leland, 6 Robt. (N. Y.) 358. — ED.

[2] Part of the opinion is omitted. — ED.

that its terms and conditions were not known to these shippers, although they had accepted a large number of them in the course of their business with the appellants.

The terms and conditions of this bill of lading, or receipt, were inserted for the purpose of limiting the liability appellants were under by the common law. They should appear plainly in the instrument, be understood by the consignor, and knowingly accepted as the contract of the parties, and intended to evidence the terms of the contract. These were points for the court trying the case, and the finding of the court in this respect cannot be disturbed.

We see no cause to depart from the rule established by this court, in Adams Express Co. *v.* Haynes, 42 Ill. 89, and Ill. Central R. R. Co. *v.* Frankenberg *et al.*, 54 Ill. 88, and that is, if a shipper takes a receipt for his goods from a common carrier, which contains conditions limiting the liability of the carrier, with a full understanding, on the part of the shipper, of such conditions, and intending to assent to them, it becomes his contract as fully as if he had signed it, and these are questions for the jury. . . .[1]

WEHMANN *v.* MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY.

SUPREME COURT OF MINNESOTA, 1894.

[58 *Minn.* 22.]

GILFILLAN, C. J. The defendant had a connection with the Lehigh Valley Transportation Company and the Lehigh Valley Railroad Company, forming a continuous line from Minneapolis to various points in the east; the defendant's part of such continuous line being by rail from Minneapolis to Gladstone, Mich., the transportation company's part by boat from Gladstone to Buffalo, N. Y., and the Lehigh Valley Railroad Company's from Buffalo by rail to various points in the east, among them to Philadelphia. The three carriers had established and published joint or through tariffs of rates for freight carriage from Minneapolis to the various points in the east to which the continuous line extended, so as to come within the provisions of 25 U. S. Stat. ch. 382, p. 855.

Plaintiffs shipped with defendant, at Minneapolis, a carload of flour, consigned to a party named in the bill of lading at Philadelphia. It arrived at Gladstone November 21, 1891, was put in defendant's warehouse at that place, where it remained till November 29th, when it was destroyed by fire. There was no evidence on the trial that notice of the arrival of the flour at Gladstone was given to the transportation company or to the plaintiff.

[1] *Compare:* Gaines *v.* Union T. & I. Co., 28 Oh. St. 418. ED.

We do not think the establishing of joint or through rates in such cases of itself makes the different carriers in the continuous line joint carriers for the line, or makes any one of the carriers liable for the defaults of any of the others. At the most, the receiving carrier would be agent for each of the others to contract for carriage over their respective lines, so as to create a duty on each to receive goods at the point where the preceding carrier's line ends, and carry them to the end of its part of the line, and deliver them to the carrier next beyond.

The bill of lading executed by defendant to plaintiff cannot be construed to be a contract on its own behalf to carry from Minneapolis to Philadelphia, or anything more than a contract to carry over its own line to Gladstone, and there deliver to the transportation company.

Under such an arrangement for a continuous line and joint or through rates it is the duty of the first or receiving carrier, on receiving goods for carriage to any point on the continuous line beyond its own line to carry them with due despatch to the end of its line, and there deliver them to the next carrier, whose duty it is to receive and carry them with due despatch to their place of destination, and deliver them to the owner or consignee; or, if the place of destination be beyond its own line, to deliver them at the end of its line to the next carrier, to which a like duty will then attach. In such case, the owner, by delivering his goods to be carried through, does not contemplate nor make a contract for storage. His contract is for carriage, and, until the goods reach their final destination, he has a right to a continuous carrier's duty and responsibility, which cannot, without his consent, be changed to the duty and responsibility of a warehouseman, however convenient that might be for the carrier. And, from the time its duty of carrier attaches, any carrier in the line can discharge itself of the responsibility as such only by performing its full duty by carrying the goods, and delivering them to the next carrier if they are to go beyond its line. The responsibility of the preceding carrier does not cease until the responsibility of the next one attaches. Any other rule would make any arrangement for a continuous line and through rates a snare to the public.

The liability of the defendant is to be determined as though its contract had been to carry to Gladstone, and there deliver to any consignee.

There is no express evidence on the point, but under the arrangement for a continuous line, it is to be presumed that the transportation company had an agent at that point, to whom the flour might have been delivered, and to whom notice of its arrival might have been given; and that the defendant knew who that agent was.

When the consignee resides at the place of destination, or has an agent there, authorized to receive the goods, and that is known to the carrier, the latter's liability as carrier does not end, and the liability become that of a warehouseman, until the lapse, after notice to such consignee or agent that the goods have arrived, of a reasonable time to

receive and remove them. Derosia *v.* Winona & St. Peter R. Co., 18 Minn. 133 (Gil. 119); Pinney *v.* First Division St. P. & P. R. Co., 19 Minn. 251 (Gil. 211).

As the flour was not delivered to the transporation company, nor notice of its arrival given to its agent, so that its responsibility as carrier might attach, the responsibility of defendant as carrier had not ended at the time of the fire, unless, by virtue of a clause in the bill of lading in these words: "It being further expressly agreed that this company assumes no liability, and it is not to be held responsible as common carrier, for any loss or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damage thereto, or any delay in transportation or delivery thereof, by any connecting or succeeding carrier."

Conceding that, because this was a shipment for carriage beyond the limits of the State, the statutes of the State do not apply, and that the validity of the clause is to be determined by the principles of the common law, then the question arises, was there a consideration to support it? Such a clause, to be of force, must stand as a contract between the shipper and the carrier, and, as in the case of all contracts, there must be a consideration for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the full common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates. And, where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability. But in such a case as this, any abatement of rates is forbidden by act of Congress, and therefore none can be presumed.

The tariff of joint rates in the case makes no mention of any limitation of liability. They are to be taken, therefore, as rates established for carriage with full common carrier's liability; and under the act of Congress no abatement could be made to support a contract for a limited liability.

The clause is void for want of a consideration to support it.

Order affirmed.

EXPRESS COMPANY *v.* CALDWELL.

SUPREME COURT OF THE UNITED STATES, 1874.

[21 *Wall.* 264.]

ERROR to the Circuit Court for the Western District of Tennessee.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee; places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefore within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

STRONG, J. Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable — if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their em-

ployers on equal terms. There is, in a very important sense, a necessity, for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In York Company *v.* The Central Railroad Company, 3 Wall. 107, it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, Railroad Company *v.* Lockwood, 17 Wall. 357, where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within

ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company *v.* Lockwood. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought

for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy. See Riddlesbarger *v.* Hartford Insurance Co., 7 Wall. 386, and the numerous cases therein cited.

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowlege of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf *v.* The Western Union Telegraph Co., 62 Penn. St. 83, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in Young *v.* The Western Union Telegraph Co., 34 N. Y. Super. Ct. 390.

In Lewis *v.* The Great Western Railway Co., 5 H. & N. 867, which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed.[1] But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defence to the action.

[1] See Garton *v.* B. & E. Ry., 1 B. & S. 112; Capehart *v.* S. & R. R. R., 81 N. C. 438; Adams Exp. Co. *v.* Reagan, 29 Ind. 21. See Glenn *v.* Southern Exp. Co., 86 Tenn. 594. — Ed.

We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is the Southern Express Company *v.* Caperton, 44 Ala. 101. There the receipts for the goods contained a provision that there should be no liability for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liability for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that too under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper." This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 36 Ga. 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts: in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.[1]

[1] See W. U. T. Co. *v.* Dunfield, 11 Col. 335; Black *v.* W. S. L. & P. Ry., 111 Ill. 351; Sprague *v.* M. P. Ry., 34 Kans. 347. See also Western Ry. *v.* Little, 86 Ala. 159; Phifer *v.* C. C. Ry., 89 N. C. 311. — Ed.

PRIMROSE *v.* WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF THE UNITED STATES, 1894.

[154 *U. S.* 1.]

GRAY, J.[1] This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: —

"☞ Read the notice and agreement on back of this blank.☜"

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1st.] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the original office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d.] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d.] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employee of the company is authorized to vary the foregoing."

"[4th.] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of

[1] Part of the opinion, discussing the measure of damages, is omitted. — ED.

which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third, by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. Express Co. *v.* Caldwell, 21 Wall. 264, 269, 270; Telegraph Co. *v.* Texas, 105 U. S. 460, 464.

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order of message, which is not to be carried in the form or characters in which it is received, but it is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in Express Co. *v.* Caldwell, above cited: "Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be

determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. Railroad Co. *v.* Lockwood, 17 Wall. 357; Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 442, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "Where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." Hart *v.* Pennsylvania Railroad, 112 U. S. 331, 343.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise.

In Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 453, the effect of such a regulation was presented by the certificate of the Circuit Court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in McAndrew *v.* Electric Tel. Co., 17 C. B. 3, and in Baxter *v.* Dominion Tel. Co., 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.[1]

The only cases, cited by the plaintiff, in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy

[1] The learned judge cited, to the same effect, Camp *v.* W. U. T. Co., 1 Met. (Ky.) 164; W. U. T. Co. *v.* Carew, 15 Mich. 525; Birney *v.* N. Y. & W. T. Co., 18 Md. 341; U. S. T. Co. *v.* Gildersleeve, 29 Md. 232; Passmore *v.* W. U. T. Co., 9 Phila. 90, 78 Pa. 246; W. U. T. Co. *v.* Stevenson, 128 Pa. 442; Breese *v.* U. S. T. Co., 48 N. Y. 132; Kiley *v.* W. U. T. Co., 109 N. Y. 231; and other cases. — Ed.

and void, appear to be Tyler *v.* Western Union Tel. Co., 60 Illinois, 421, and 74 Illinois, 168; Ayer *v.* Western Union Tel. Co., 79 Maine, 493; Telegraph Co. *v.* Griswold, 37 Ohio St. 301; Western Union Tel. Co. *v.* Crall, 38 Kansas, 679; Western Union Tel. Co. *v.* Howell, 38 Kansas, 685; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in Dorgan *v.* Telegraph Co., 1 Amer. Law Times (N. S.), 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in Tyler *v.* Western Union Tel. Co., above cited.

In that case, the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker, "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The Supreme Court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Illinois, 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender is a contract or not, depends on circumstances," and "whether he had knowledge of its terms and consented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Illinois, 431–433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not; or else to allow to the stipulation no effect whatever, for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a

message is written, is a contract, we held, it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges." 74 Illinois, 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation and amounts to a contract." And again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Illinois, 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back he did not venture to say that he had not read it; still less, that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message, and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds *quo* perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying, to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15, there was substituted a word signifying that his message of June 17 had been received (which was evidently impossible), could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting, for the last word "purchase" in the singular, the word "purchases" in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the State of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), prove that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form; and that, as written down by the operator at Ellis, it was in its altered form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth. Nor is there anything in the case, tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor

the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville, in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader. *Judgment affirmed.*[1]

Fuller, C. J., and Harlan, J., dissented.

[1] See, *contra*, Reed *v.* W. U. T. Co., 135 Mo. 661. — Ed.

BELGER *v.* DINSMORE.

COMMISSION OF APPEALS, NEW YORK, 1872.

[51 *N. Y.* 166.]

APPEAL from an order of the General Term of the Supreme Court in the first judicial district, setting aside a verdict in favor of defendant and granting a new trial. Reported below, 51 Barb. 69; 34 How. Pr. 421.

The action was brought to recover the value of a trunk and its contents delivered by the plaintiff to the defendant for transportation, but which never reached its place of destination.

It was shown, on the trial, that six trunks and three boxes were delivered on the 4th day of May, 1864, by the wife of the plaintiff to the Adams Express Company to be carried from Baltimore, Maryland, to Newport, Rhode Island.

When the said trunks and boxes were received by the company, a receipt was given therefor.[1]

The counsel for the plaintiff then offered to prove negligence on the part of the defendant, insisting that it had been guilty of gross negligence and carelessness, but the court excluded such proof, and held that the said receipt was, to all intents and purposes, a contract between the parties, and that defendant was by it excused from all liability, except as stated in the receipt. To this ruling the counsel for the plaintiff excepted.

The court then, after the refusal of a request by the plaintiff to go to the jury on the question of gross negligence, against his exception, charged the jury that the contents of the said receipt were a contract binding on the plaintiff, and limited the liability of the Adams Express Company, and of the defendant for any loss of or damage to any of the contents of any of the trunks or boxes specified in said receipt to the sum of fifty dollars, and directed the jury to find a verdict for the plaintiff for fifty dollars principal, with interest from the date of the receipt. To which charge and direction the plaintiff's counsel excepted.

The court ordered the exceptions to be heard in the first instance at General Term, and that judgment be in the meantime suspended.

LOTT, C. C. The parties appear to agree upon two propositions, as established by the decision of the courts in this State.

1st. That the appellant, the Adams Express Company, is a common carrier.

2d. That common carriers may limit their liability by express contract.

The question, then, arises whether there was such a contract in this case. The instrument relied on as evidence of the contract, as has al-

[1] Part of the case is omitted. — ED.

ready been stated, does not merely acknowledge the delivery and receipt of the property in question to the express company for transportation, but, in connection therewith, it is declared to be a part of the terms and conditions on which it was received that the company was not to be responsible for loss and damages resulting from certain specified causes, unless proved to have occurred from fraud or gross negligence of the company or its agents; and that the holder thereof should not, in any event, demand beyond the sum of fifty dollars, fixed as the value of the article to be carried, unless otherwise expressed. A party accepting such an instrument, as has been already shown, declares his assent by such acceptance, to those terms and conditions. They thereby become obligatory on both parties, and prescribe their mutual rights and obligations.

On the application of that rule to this case, the plaintiff assented (by omitting to have a different value expressed in the instrument) to the valuation of the property in question at the sum of fifty dollars, and to the restriction and limitation of his claim and demand for damages, in case of its loss, at that sum. Such liquidation of its value was for the advantage of both parties, to guard against controversy or difference of opinion in estimating it, in case of loss and damage, and as a protection against fraud. It is reasonable to assume that the price or compensation for the transportation of property has relation to the restricted or limited liability assumed on agreeing to transport it, and is to a great degree regulated and graduated by its value; and if a party only pays the price fixed for articles of small value, or estimated at a low sum, he himself bears all risks beyond that value or price. The plaintiff in this case must be assumed to have paid freight on the trunk in question and its contents, worth $467, at the rate prescribed for an article not exceeding fifty dollars in value. He was then willing and agreed to assume all risks for the excess in value, and to relieve the company from all liability on account thereof beyond that sum. He can with no more propriety or justice claim remuneration therefor than the company could demand additional freight thereon.

The rulings of the judge at the circuit were in accordance with those principles, and the General Term appear to have placed their decision, in directing a new trial, on the ground that the provision to which I have above referred, although contained in the receipt itself, was a notice merely, which it is said, in the opinion of the court, "at most is only a proposal for a special contract which requires the assent of the other party." The material fact in this case appears to be entirely overlooked, that the plaintiff, by accepting the receipt as evidence of the defendant's obligation and liability, gave his assent to what was considered as a proposal, and to all its terms and conditions, and that it thereby became operative and effectual as a contract.

The views above expressed show that the order of General Term, in setting aside the verdict and ordering a new trial, was erroneous. It must, therefore, be reversed and judgment on the verdict must be ren-

dered against the defendant, with the costs of both appeals to the appellant.

All concur.

Order reversed, and judgment accordingly.[1]

MOULTON *v.* St. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY.

SUPREME COURT OF MINNESOTA, 1883.

[31 *Minn.* 85.]

DICKINSON, J.[2] The plaintiffs shipped two carloads of horses at St. Paul, over defendant's line of road, to points in Dakota. Two of the horses died by reason of prolonged exposure to cold weather, as is claimed, caused by defendant's negligent detention of the train during transportation. The action is for the recovery of the value of these two horses, which appears to have been $200 each. For the purposes of this appeal, we are to consider the negligence of the defendant as established, and are to determine whether the defendant is liable for its negligence, and the measure or extent of its liability under the contract made by the parties.

The contract under which the property was shipped, and which was executed by both plaintiffs and defendant, contained the provisions that in consideration that the defendant would transport the property at the rate of $75 per carload, "the same being a rate given, subject to the conditions of this contract," the plaintiffs released the defendant from the liability of a common carrier, and from any liability for any delay in shipping the stock after its delivery to the defendant, and agreed that the liability of the defendant should be only that of a private carrier for hire. The plaintiffs contracted to assume all risk of damage which might be sustained by reason of any delay in transportation, and all risk of damage from any other cause, not resulting from the wilful negligence of the agents of the defendant. It was further agreed that, in case of total loss, the damage should in no case exceed the sum of $100 per head, and, in case of partial loss, damage should

[1] "If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier.

"If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus gets reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. To hold otherwise would be to enable the shipper to take advantage of his own wrong." ZOLLARS, J., in Rosenfeld *v.* P. D. & E. Ry., 103 Ind. 121. — ED.

[2] Part of the opinion is omitted. — ED.

be measured in the same proportion. A printed "regulation" of the defendant, attached to the contract, provided that the defendant would not assume any liability over $100 per head on horses and valuable live-stock, except by special agreement. By the contract of the parties the owner of the horses attended and cared for them upon the passage, without extra charge for his own transportation. . . .

The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized.

Upon the face of the contract under consideration, it is apparent that it was not the purpose of the parties to liquidate the damages recoverable, with reference to the value of the property consigned to the carrier. Its provisions are somewhat contradictory, and not easily reconciled. The general regulation attached to the contract, to the effect that the company "will not assume any liability over one hundred dollars per head on horses and valuable live-stock except by special agreement," is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation it is, therefore, of no effect. The law declares that the carrier shall be liable to the extent of the value of the property, although there be no special agreement. We do not question the right of a carrier to require the disclosure, by the consignor, of the value of the property presented for transportation, where its value is not apparent and well known. This is reasonable, both to the end that proper care may be taken of the property while it is in the hands of the carrier, and because the proper charges for transportation may often depend largely upon value. We see nothing, however, in this contract which can be regarded as having been intended as calling for such a disclosure on the part of the plaintiffs, or as estopping them from claiming a recovery, upon the ground of the carrier's negligence, of the actual value of the horses. In terms, the contract purports to relieve the defendant from liability, even for

its own negligence, and, at the same time, if a recovery shall be had notwithstanding this agreement, then the amount of such recovery is limited to the sum of $100 per head. These stipulations cannot naturally be applied to a case involving as the cause of action the negligence of the carrier, without making them, in effect, to be an agreement in the first place for absolute exemption from liability (except for wilful negligence); and if, notwithstanding the agreed exemption, a recovery should be awarded, it shall not exceed the sum named; that is to say (as applied to a case of negligence), it is, in effect, an agreement for absolute exemption, and, that failing to be sustained, then for a partial exemption, from the liability which the law imposes in such cases, and which cannot be laid aside by the mere consent of parties. Such a contract cannot be sustained. *Order affirmed.*

HART *v.* PENNSYLVANIA RAILROAD.

SUPREME COURT OF THE UNITED STATES, 1884.

[112 *U. S.* 331.]

BLATCHFORD, J. It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.[1]

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It

[1] The learned judge here examined the following cases. York Co. *v.* Central R. R., 3 Wall. 107; R. R. *v.* Lockwood, 17 Wall. 357; Express Co. *v.* Caldwell, 21 Wall. 264; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174. — Ed.

may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; Relf *v.* Rapp, 3 Watts & Serg. 21; Dunlap *v.* International Steamboat Co., 98 Massachusetts, 371; Railroad Co. *v.* Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In Gibbon *v.* Paynton, 4 Burrows,

2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive runs the risk of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is Batson *v.* Donovan, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger *v.* Howard, 6 Philadelphia Rep. 174; Squire *v.* New York Central R. R. Co., 98 Massachusetts, 239; Hopkins *v.* Westcott, 6 Blatchf. 64; Belger *v.* Dinsmore, 51 New York, 166; Oppenheimer *v.* United States Express Co., 69 Illinois, 62; Magnin *v.* Dinsmore, 56 New York, 168, and 62 New York, 35, and 70 New York, 410; Earnest *v.* Express Co., 1 Woods, 573; Elkins *v.* Empire Transportation Co., 81* Pennsylvania St. 315; South & North Alabama R. R. Co. *v.* Henlein, 52 Alabama, 606; Same *v.* Same, 56 Alabama, 386; Muser *v.* Holland, 17 Blatchf. 412; Harvey *v.* Terre Haute R. R. Co., 74 Missouri, 538; and Graves *v.* Lake Shore Ry. Co., 137 Massachusetts, 33. The contrary rule is sustained in Southern Express Co. *v.* Moon, 39 Mississippi, 822; The City of Norwich, 4 Ben. 271; United States Express Co. *v.* Backman, 28 Ohio St. 144; Black *v.* Goodrich Transportation Co., 55 Wisconsin, 319; Chicago, St. Louis & N. O. R. R. Co. *v.* Abels, 60 Mississippi, 1017; Kansas City, &c., Railroad Co. *v.* Simpson, 30 Kansas, 645; and Moulton *v.* St. Paul, &c. R. R. Co., 31 Minnesota, 85. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier — its just and reasonable character — we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from lia-

bility beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the Act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire *v.* New York Central R. R. Co., 98 Massachusetts, 239, 245, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is

Affirmed.[1]

GRAVES *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1884.

[137 *Mass.* 33.]

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The

[1] *Compare:* Graves *v.* Adams Express Co., 176 Mass. 280; Ballou *v.* Earle, 17 R. I. 441. — ED.

bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of $20 per barrel, owner's risk of leakage." It also contained the agreement, that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. Dunlap *v.* International Steamboat Co., 98 Mass. 371; Judson *v.* Western Railroad, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be con-

clusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he intrusts to the carrier, should not be bound by his valuation. M'Cance *v.* London & North Western Railway, 7 H. & N. 437; s. c. 3 H. & C. 343; Railroad *v.* Fraloff, 100 U. S. 24; Muser *v.* Holland, 17 Blatchf. C. C. 412; s. c. 1 Fed. Rep. 382; Hart *v.* Pennsylvania Railroad, 2 McCrary, 333; s. c. 7 Fed. Rep. 630; Magnin *v.* Dinsmore, 70 N. Y. 410.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than $20 per barrel.

Judgment affirmed.[1]

[1] *Compare:* The Lydian Monarch, 23 Fed. 298; Brown *v.* S. S. Co., 147 Mass. 58. — Ed.

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